90-1695

Supreme Court, U.S.
FILED
MAY 6 1991
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MARTIN J. SCHWIMMER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether it is proper for a judicial decision to "dramatically expand the scope of criminal liability" under 18 U.S.C. §1954 by extending the statute's reach to classes of persons not mentioned in the statute and by simultaneously narrowing its express exception.

A. Whether a person may be criminally liable under 18 U.S.C. §1954(1) -- which proscribes receipt of certain payments by "an administrator, officer, trustee, custodian, counsel, agent, or employee" of any employee benefit plan -- if he "has the

capacity to influence, directly or indirectly, the use of . . . benefit plan funds" even though he does not hold any of the enumerated positions.

B. Whether the bona fide compensation proviso of 18 U.S.C. §1954 applies only where the person who has received payment has made full disclosure to the plan concerning his commissions, compensation, and profit.

C. Whether the expansive reading of §1954, if appropriate at all, must be applied

prospectively only.

II. Whether the Sixth Amendment's right to counsel was violated where, prior to trial, the prosecutor obtained copies of workpapers which were developed for purposes of the defense and which the prosecutor knew were protected by the attorney-client privilege so that he could assure himself that there was nothing in the defense which would surprise him at trial.

PARTIES TO THE PROCEEDINGS IN THE COURT WHERE JUDGMENT IS SOUGHT TO BE REVIEWED

The parties in the court below were Martin Schwimmer, defendant-appellant, and the United States of America, appellee.

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OPINIONS BELOW

During the trial, the district court rendered two opinions which addressed the scope of 18 U.S.C. §1954, and its bona fide compensation proviso. They are reported at 700 F.Supp. 104 (E.D.N.Y. 1988), and 706 F.Supp. 6 (E.D.N.Y. 1989), and are reproduced in the appendix at A-32 and A-43, respectively.

On appeal, the Court of Appeals did not, initially, reach those issues. It adressed only the issue of breach of the attorney-client privilege, and remanded the case to the district court for further proceedings on that issue. That decision is reported at 892 F.2d 237 (2d Cir. 1989), and is reproduced in the appendix at A-13.

Following the remand, the district court issued an opinion, which is reported at 738 F.Supp. 654

(E.D.N.Y. 1990), and reproduced at A-52.

On January 23, 1991, the Court of Appeals rendered its decision, affirming the conviction. It is reported at 924 F.2d 443 (2d Cir. 1991), and reproduced in the appendix at A-1.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Second Circuit was entered on January 23, 1991. (A-100) The petition for rehearing was denied by order entered on March 19, 1991. (A-102) The Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> . . . nor shall any person . . . . be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Section 1954 of Title 18 of the United States Code provides:

> Whoever being:
>
> (1) an administrator, officer, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or
>
> (2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or
>
> (3) an officer, counsel, agent, or employee of an employee

organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision

of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

INTRODUCTION

This case raises the fundamental question whether it is proper for a judicial decision to "dramatically expand" the scope of criminal liability under a federal criminal statute. If there is any doubt that the Court of Appeals' decision does dramatically extend the scope of §1954, one need only consult the prosecutor who fashioned the charges and tried the case. In an article he wrote which appeared on the front page of the New York Law Journal, he describes the decision's broad ramifications, bemoaning only the fact that the decision's significance has yet to be fully appreciated.

Petitioner submits that this dramatic expansion of the statute is unwarranted; it is inconsistent with the statute's language and its

legislative history. In any event, even if the Court of Appeals' interpretation of the statute is a correct one, Petitioner submits that it can apply only prospectively, because he had no fair warning that the law proscribed the conduct the Court of Appeals has now ruled to be illegal.

STATEMENT OF FACTS

Petitioner Martin Schwimmer, Mario Renda, and their firm, First United, offered investment opportunities in the form of jumbo CD's issued by various banks and savings and loan institutions to the employee benefit plans of Local 38 of the Sheetmetal Workers and of Local 810 of the International Brotherhood of Teamsters. These jumbo CD's were attractive investments for the plans; they carried negotiated interest rates far higher than those available on smaller CD's.

Petitioner received no compensation whatsoever from Local 810 or its benefit plans, nor did he pay off anyone from the union or the plans in order to obtain the plans' business. (A-20) Rather, he was compensated for his work brokering these CD's through commissions paid to First United by the banks which issued the CD's. Renda and Petitioner, as First United's principals, shared the commissions, which were placed in off-book accounts, and, according to the government, not reported as income.

The trustees and administrators of the benefit plans knew that Petitioner was not a good samaritan or a volunteer; they assumed that he was being compensated for his work, through commissions or otherwise. They never inquired as to the amount or basis for his compensation, and Schwimmer did not

volunteer this information. At all times, the plans had full and accurate knowledge of the interest paid on their CD investments.

In a straightforward application of §1954, the indictment in this case charged that Petitioner -- who was a financial advisor to Local 38's benefit plans and who was paid by those plans for his services -- violated §1954 by accepting commissions from banks in connection with investments made by the Local 38 benefit plans.

However, Petitioner was also indicted, under 18 U.S.C. §1954, on the novel and unprecedented claim that his receipt of commissions from the banks on Local 810's investments violated that statute. To appear to come within the statutory language the indictment nevertheless recited that Petitioner was "an investment advisor to, and an

agent and counsel of" the employee benefit plans of Local 810.[1]

Not surprisingly, Petitioner's relationship with Local 810's plans became a critical issue at his trial. Local 810's comptroller, Steven Gilman, testified, without contradiction, that Schwimmer was paid nothing by Local 810 or its employee benefit plans; Gilman assumed that Schwimmer was receiving compensation from other sources. (A-20) Furthermore, Gilman made clear that, although nearly half of Local 810's investments and almost all of its CD investments were made through Schwimmer, the investment <u>decisions</u> were not made by Petitioner, but by

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[1] Petitioner's indictment also charged him with income tax evasion for failure to report commissions, conspiracy to defraud the United States, and RICO conspiracy, based on the predicate §1954 offenses. Petitioner was convicted on these charges, too.

Dennis Silverman, who was president of Local 810 and the administrator of its funds. Unlike Silverman, Petitioner was not a fund fiduciary. He was viewed as a stockbroker or other independent provider of investment opportunities.

Notwithstanding the absence of any agency or fiduciary relationship to Local 810's plans, even though the statute's language is quite specific, and over Petitioner's objection, the trial court adopted the government's view that Petitioner could nevertheless be subject to §1954. The court charged the jury that §1954 reaches all persons "with the capacity to influence, directly or indirectly, the use of employee benefit funds," whether or not they occupy any of the positions enumerated in the statute. The court instructed that, even if Petitioner was

not an agent or counsel to the local, or its funds, he was subject to §1954 if his investment advice or recommendations had a significant influence on the funds' investment decisions.

Responding to the jury's requests for clarification during deliberations, the court also instructed that §1954's proviso exempting from the definition of prohibited payments the acceptance of "bona fide salary, compensation, or other payments made for . . . services actually performed in the regular course of his duties" applied only if the person receiving such payments disclosed to the plan details of his compensation. (A-32)

On his appeal to the Court of Appeals for the Second Circuit from his conviction, Petitioner challenged the district court's novel interpretation

of §1954, and the jury instructions based on that interpretation. The Court of Appeals affirmed. (A-1)

It held that §1954's "proscription extends to 'all persons who exercise control, direct or indirect, authorized or unauthorized[,] over [a plan]'" whether or not they hold one of the enumerated positions. (A-9) Invoking the broad, protective purposes of §1954, the Court also approved the lower court's ruling that a person could fall within the statute's bona fide compensation provision only if he had made disclosure of the compensation:

> Because Section 1954 uses broad language to protect plan beneficiaries from dishonest or unfaithful fiduciaries, it seems clear that the statute was meant to reach Schwimmer's intentional failure to inform the trustees of Local 810 that he was extracting a commission from the placement of their investments. (A-11)

The Second Circuit's

extraordinarily expansive reading of §1954 reflected in the court's first holding, and the peculiarly narrow reading of §1954's bona fide compensation exemption to contain a disclosure requirement, which is the court's second holding, fly in the face of explicit statutory language, legislative history, case law, and sound considerations of public policy. The ruling necessarily affects all who offer financial or other products to pension plans. Ultimately it will also affect the plans themselves, which, as a result of the Court's ruling, will simply cease being offered the products and services available to all others.

The Court of Appeals also rejected Petitioner's claim on appeal that his Sixth Amendment right to counsel and the attorney-client privilege had been violated by the prosecution. (A-7-8)

Prior to trial, government prosecutors had obtained from an accountant retained by the defense team, certain documents prepared by the accountant for purposes of the defense and protected by the attorney-client privilege. The documents were the accountant's worksheets which, inter alia, allocated the commissions received by First United between Mario Renda and Petitioner and which were prepared by the accountant for purposes of their joint defense.[2] Although the government was on clear notice that the worksheets were protected by the attorney-client privilege, it obtained the documents, as the prosecutor acknowledged, so that he could assure himself that they contained nothing which might "bite him in the ass," that

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[2] Renda ultimately pled guilty before trial.

is, surprise him at trial and undermine the government's case. Having acquired the workpapers and having concluded that they contained nothing which would jeopardize the government's case, the prosecution claimed that it made no further use of them.

Following a remand by the Court of Appeals for factfinding on the government's use of the privileged documents, the district court found that there had been no impermissible use of the documents. (A-52) It wholly ignored Petitioner's claim that the prosecutor's admitted acquisition and use of the worksheets to reassure himself that the defense would not surprise him at trial was itself an impermissible use of the privileged material.

The Court of Appeals, affirming, refused to disturb the district court

ruling. It too wholly ignored Petitioner's claim that the prosecutor's intentional invasion of the defense camp to obtain documents the prosecutor knew were protected by the attorney-client privilege -- and his use of the documents to put his mind at ease about the defense the defendant would present -- violated Petitioner's Sixth Amendment rights.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS DRASTICALLY AND IMPROPERLY EXPANDED THE SCOPE OF 18 U.S.C. §1954, WHILE DRASTICALLY AND IMPROPERLY CONTRACTING THE EXPRESS STATUTORY EXEMPTION, AND IN SO DOING, HAS VIOLATED PETITIONER'S DUE PROCESS RIGHTS

Throughout these proceedings, the prosecutor who fashioned Petitioner's indictment and tried the case downplayed the novelty of the government's theory of Petitioner's criminal liability under 18 U.S.C. §1954, and ignored the ramifications of that theory. But the prosecution has always known what judicial acceptance of his approach would mean.

As he wrote in an article about this case which recently appeared on the front page of the New York Law Journal:

> In a recent sleeper of a decision whose repercussions have yet to be felt, the U.S.

> Court of Appeals for the Second Circuit dramatically expanded the scope of potential criminal liability for investment advisors and others who provide financial services to employee benefit plans, including most notably, union pension funds.

Maffeo, 'Schwimmer' Expands Liability For Union Pension Fund Advisors, N.Y.L.J., Apr. 11, 1991, at 1, col. 1. If anything, the prosecutor continues to understate the ramifications of the Court of Appeals' decision.

As a result of that decision, every bank, insurance company, brokerage house, or investment firm (as well as their officers or employees), which has successfully solicited investment business from any pension or other employee benefit plan and which has not disclosed the profit (or salary, or commissions) it will make on the plan's business has violated 18 U.S.C. §1954. If the bank, insurance

company, brokerage house, or investment firm (or its officers or employees) successfully solicits more than a single investment or solicits from more than a single employee benefit plan, the criminal RICO statutes will have been violated as well. But there is more. The decision of the Court of Appeals is not limited by either its logic or its terms to investment-related services. Under the Court of Appeals' decision, any person or business entity which supplies goods or services of any sort to an employee benefit plan at a profit or who is compensated for his work, either by salary or by commission, has committed a federal felony unless the amount of his profit, salary, or commission is disclosed to the plan.

As the prosecutor has now acknowledged, the reading of §1954

urged by him and endorsed by the Court of Appeals "dramatically expanded the scope of potential criminal liability" under that statute. Petitioner submits that this judicial expansion conflicts with the clear and explicit language of the statute, and criminalizes conduct by persons the statute was never intended to reach. The unjustified expansion of liability throws into question the propriety of the conduct of scores of financial institutions which have long dealt with employee benefit plans precisely as the Petitioner did. Ironically, rather than protecting plan beneficiaries, the court's decision must ultimately hurt them, for those who have made investment opportunities available to employee benefit plans can no longer do so without risking criminal sanctions. Imposing criminal penalties on the

Petitioner -- who faces a ten year prison sentence and over six million dollars in fines and forfeitures -- is particularly inappropriate. Because the statute Petitioner has been convicted of violating gave no fair notice that it meant what the Court of Appeals now says it means, Petitioner's conviction violates his right to due process.

A. THE COURT OF APPEALS' CONSTRUED §1954(1) MUCH TOO BROADLY WHEN IT READ THE STATUTE TO REACH PERSONS WITH NO EMPLOYMENT OR FIDUCIARY RELATIONSHIP TO AN EMPLOYEE BENEFIT PLAN

This case involves Section 1954 of Title 18, one of three criminal offenses created by the Welfare and Pension Plan Disclosure Amendment Act of 1962, Pub. Law 87-420. That law was enacted to strengthen the Welfare and Pension Plan Disclosure Act of 1958, Pub. Law 85-836, Congress' first effort

to eliminate certain perceived abuses in the management and administration of pension plans and other employee benefit plans. Ultimately, Congress found that the 1958 Act and its 1962 amendments were inadequate to protect the beneficiaries of employee benefit funds, and enacted the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 et seq. ("ERISA"). ERISA contains complex and comprehensive reporting and disclosure requirements, and sets standards for the conduct of persons who manage employee benefit plans and plan funds.

The language of §1954 is inartful, but it is not impenetrable. In specific terms, it proscribes the giving of anything of value to any administrator, officer, trustee, custodian, counsel, agent or employee of any employee benefit plan (welfare

plan or pension plan), or to any officer, counsel, agent or employee of any employer or any union whose employees or members are covered by such a plan, because of such person's actions, decisions or duties relating to the plan. It also prohibits the receipt of anything of value by those same categories of persons with intent to be influenced in his actions, decisions or duties.[3]

Until this case, all prosecutions

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[3] In addition, it prohibits payment to or receipt of payment by a person or entity which provides benefit plan services to a plan, or any officer, counsel, agent or employee of such an entity. That provision, §1954(4), is not at issue here. Subsection (4) applies only to those who provide benefit plan services to a plan for a fee paid by the plan. See Thornton v. Evans, 692 F.2d 1064, 1077 (7th Cir. 1982); Chambers v. Kaleidoscope, Inc., Profit Sharing Plan and Trust, 650 F.Supp. 359, 376 (N.D. Ga. 1986). See also 29 U.S.C. §1002 (21)(A). Further, the challenged instructions to the jury were given in connection with subsection (1), not subsection (4).

under the statute had been confined to persons who did occupy one or more of the seven specified positions in an employee benefit plan or one or more of the specified union or employer positions. A uniform body of case law had developed which made clear that the commands of the statute applied to any person who occupied one or more of the specified positions and who was in a position to exercise influence over the disposition of plan funds. See United States v. Robilotto, 828 F.2d 940 (2d Cir.), cert. denied, 484 U.S. 1011 (1988) (union's business agent); United States v. Friedland, 660 F.2d 919 (3d Cir. 1981) (general counsel to the local); United States v. Romano, 684 F.2d 1057 (2d Cir.), cert. denied, 459 U.S. 1016 (1982) (security treasurer of the union; executive administrator of the plan); United States v. Berger, 433

F.2d 680 (2d Cir. 1970), cert. denied, 401 U.S. 962 (1971) (union president, pension fund trustee); United States v. Dorfman, 470 F.2d 246 (2d Cir. 1972), cert. dismissed, 411 U.S. 923 (1973) (special consultant to the fund); United States v. Russo, 442 F.2d 498 (2d Cir. 1971), cert. denied, 404 U.S. 1023 (1972) (fund agent and counsel); United States v. Schwartz, 785 F.2d 673 (9th Cir.), cert. denied, 107 S.Ct. 290 (1986) (plan trustees); United States v. Soures, 736 F.2d 87 (3d Cir. 1984), cert. denied, 469 U.S. 1161 (1985) (union president); United States v. Provenzano, 615 F.2d 37 (3d Cir.), cert. denied, 446 U.S. 953 (1980) (fund trustee); United States v. Palmeri, 630 F.2d 192 (3d Cir. 1980) (president and secretary-treasurer of the local, fund trustees, business representatives and employees of the local).

The Court of Appeals for the Second Circuit has now turned this body of case law on its head by holding that it is irrelevant whether a defendant occupies one of the specified positions, and that it is sufficient if he is in a position to influence investment decisions.

One problem with this construction of the law is that the statute says no such thing and no case before this one has held or suggested that persons outside the classes so meticulously set forth in the statute are also subject to its commands.

Section 1954(1) carefully catalogues the persons to whom it applies. It does not extend to persons who have no employment relationship with the plan and who are not compensated by it, but who are employed by other businesses which seek to do

business with employee benefit plans.[4]

Moreover, considerations of public policy and fundamental fairness fully support such a construction of the statute. A person who falls within one of the enumerated classes will know or be in a position to ascertain it, and will be able to regulate his conduct accordingly. In contrast, a person who comes to a plan with an investment proposal will not necessarily know whether his recommendations are significantly

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[4] Under the maxim of statutory construction, "expressio unis est exclusio alteriums," where a statute names the parties who come within its provisions, other unnamed parties are excluded. See, e.g., Foxgord v. Hischemoeller, 820 F.2d 1030, 1035 (9th Cir.), cert. denied, 108 S.Ct. 503 (1987). This principle has always had special force in the construction of penal statutes which must, in any event, be narrowly construed to avoid subjecting to prosecution activities and individuals the legislature did not mean to expose to liability. United States v. Posnjak, 457 F.2d 1110, 1118 (2d Cir. 1972).

influencing those who in fact are charged with making investment decisions.

Nothing in the legislative history supports the Second Circuit's reading of the statute.[5] On the contrary, the legislative history demonstrates that §1954 was enacted to address certain well defined and "flagrant abuses" which survived the enactment of the Welfare and Pension Plans Disclosure Act of 1958. These flagrant abuses involved bribery, kickbacks and related conflict-of-interest payments involving

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[5] The legislative history consists of S. Rep. 908, 87th Cong. 1st Sess. (1961); H.R. Rep. 998, 87th Cong. 2d Sess. (1961), reprinted in 1962 U.S. Code Cong. & Admin. News 1532, Cong. Rec. 1417, reported in 1962 U.S. Code Cong. & Admin. News; Hearings before the House Subcommittee on Labor of the Committee on Education and Labor, 87th Cong. 1st Sess. (1961); Hearings before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 87th Cong. 1st Sess. (1961); 108 Cong. Rec. 1727-1743 (House) (1962); 108 Cong. Rec. 1927-1935 (Senate) (1962).

plan trustees and administrators, specifically, the use of relatives of parties-in-interest as recipients of purported salaries, fees or commissions and bribes in the form of loans and letters of credit. To the extent that the statute's language is broad, it reflects the conclusion that kickbacks for the benefit of pension fund administrators and fund fiduciaries take myriad forms and the determination -- subject to some controversy at the time -- that the law should cover not only union managed plans, but management (employer) managed plans, and jointly managed plans. See 108 Cong. Rec. 1931 (1962) (Sen. Javits).

Petitioner's conviction under a reading of the statute which cannot be squared with the statute's language, legislative history, or underlying purpose substantially undermines the

Congressional policy to forbid certain practices by persons with an employment or fiduciary relationship to employee benefit plans, and to leave others free to act as they always have in their dealings with employee benefit plans.

B. THE COURT OF APPEALS' RULING THAT THE BONA FIDE COMPENSATION PROVISO OF §1954 IS IN FACT A DISCLOSURE PROVISION IS LIKEWISE ERRONEOUS, AND COMPOUNDS THE MISCHIEF THE EXPANSIVE READING OF §1954's SCOPE WILL CAUSE

Construing §1954's bona fide compensation proviso, an issue of first impression, the Court of Appeals upheld an instruction to the jury that compensation cannot be bona fide, and thus its receipt cannot be lawful, unless its amount is disclosed to the union and to its benefit plans. By upholding this instruction, the panel has converted §1954, a criminal statute which prohibits the offer or acceptance

of certain proscribed payments to or by certain persons, into a disclosure law, the contours of which are unknown and unknowable.[6]

While purporting to further the legislative purpose, the ruling ignores the pertinent legislative history. Nothing in §1954's legislative history refers, either directly or indirectly, to fair disclosure, full disclosure or any duty to disclose whatsoever. See Department of Labor, Legislative History of the Welfare and Pension Plan

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[6] Petitioner submits that §1954's bona fide compensation proviso does not come into play at all in this case because he is not among the persons covered by §1954. Indeed, the proviso's inapplicability further confirms that §1954 was not intended to reach any persons except those who hold the positions enumerated in the statute. The bona fide compensation clause covers payments to persons for services performed as . . . administrators, officer, trustee, custodian, counsel, agent or employee," that is, in the covered capacities. There were no such payments at issue here in connection with Local 810.

Disclosure Act of 1958, as amended by Public Law 87-420 of 1962. Section 1954 stands in stark contrast to §1027 of Title 18, one of the other two criminal offenses created at the same time §1954 became law. Section 1027 does concern disclosure obligations; it makes it a felony to make false statements or to conceal facts in documents required to be published or kept.

Reading §1954 as a disclosure provision, as the Court of Appeals did, does not merely create a legislative design where none existed. It actually threatens to wreak havoc on ERISA. That carefully constructed statutory scheme superseded the reporting and disclosure requirements of the 1954 Act and its 1962 amendments, and established detailed and comprehensive disclosure requirements, as well as

civil and criminal sanctions for non-compliance. See 29 U.S.C. §§1021-30, 1131.

Reading disclosure obligations into §1954 is particularly inappropriate in this case because there is no dispute that Local 810 and its plans knew that Petitioner was being compensated by others for his work. Thus, if anyone associated with the plans and with fiduciary responsibility for plan monies had wanted to know details of Petitioner's or First United's profits, they need only have asked. To impose criminal penalties on Petitioner because he failed to disclose information that no one in his position has ever revealed and which no one ever asked him to disclose is patently unjust.

The Second Circuit's extraordinarily broad reading of

§1954's reach to extend to persons who, essentially, sell services or products to an employee benefit plan, coupled with the Court's peculiar reading of §1954's bona fide compensation proviso to require disclosure to the plan by any such person of his compensation or profit, will inevitably affect all those who do business with employee benefit plans. It will, Petitioner submits, result in their simple refusal to continue to do business with employee benefit plans, to the ultimate detriment of plan beneficiaries. Because the ramifications of the Court of Appeals' decision are so far-reaching, review by this Court is warranted.

C. EVEN IF THE COURT OF APPEALS' READING OF §1954 AND ITS PROVISO ARE CORRECT, THAT READING SHOULD APPLY PROSPECTIVELY ONLY

The Court of Appeals expansive reading of §1954's scope, and narrow reading of its exception, even if correct, should be applied prospectively only. Petitioner's conviction under the Court's novel and unanticipated reading of the law violates the fundamental due process principle that a criminal statute must give fair warning of the conduct that it makes a crime.[7] See, e.g., United States v. Harriss, 347 U.S. 612 (1954); McBoyle v. United States, 283 U.S. 25

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[7] The doctrine of lenity requires that any ambiguity concerning the ambit of a criminal statute should be resolved in favor of the defendant. See United States v. Enmons, 410 U.S. 396, 411 (1973) ("[criminal statues] must be strictly construed, and any ambiguity must be resolved in favor of lenity."); Rewis v. United States, 401 U.S. 808 (1971).

(1931).

As this Court has recognized, deprivation of the right to fair warning can not only arise from vague statutory language, but from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. See Bouie v. Columbia, 378 U.S. 347 (1964). See also Marks v. United States, 430 U.S. 188 (1977). Petitioner submits that is what has happened in his case. Thus, even if the Court of Appeals' construction is correct, its ruling should apply prospectively only.

II. THE DECISION OF THE COURT OF APPEALS IGNORES THE SUBSTANTIAL SIXTH AMENDMENT, ATTORNEY-CLIENT PRIVILEGE QUESTION THIS CASE PRESENTS

The Court of Appeals' decision obscures a critical point, and evades entirely an important Constitutional question warranting this Court's attention. The uncontroverted evidence established that, prior to Petitioner's trial, the Assistant United States Attorney in charge of the prosecution sent two case agents to obtain certain workpapers from an accountant who had been retained by defense attorneys. At the time, the government was on clear notice that the workpapers were prepared for the defense of the case, and that they were protected by the attorney-client privilege. In fact, the AUSA had initially been frustrated in his attempts to obtain these very workpapers from the accountant when the

accountant invoked the attorney-client privilege, and declined to produce them.

The AUSA, however, refused to give up. As he acknowledged, he wanted the workpapers before trial so that he could make sure that they contained nothing which might "bite [him] in the ass," that is, surprise him at trial and threaten the government's case. The case agent, who obtained the accountant's workpapers at the AUSA's request, reviewed them and turned them over to the AUSA. He let the AUSA know that the defense view of the facts, as revealed in the workpapers, posed no threat to the government's case. In this way, the AUSA received the very assurances that he sought.

This case squarely raises the question whether the prosecutor's admitted use of the privileged papers

to assure himself that there was no risk that he would be surprised by the defense was a proscribed use of the privileged documents and one that violated the defendant's Sixth Amendment right to counsel. See Weatherford v. Bursey, 429 U.S. 545 (1977); Hoffa v. United States, 385 U.S. 293 (1966); Glasser v. United States, 315 U.S. 60 (1942). See also Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953); Coplon v. United States, 191 F.2d 749 (D.C. Cir, 1951), cert. denied, 342 U.S. 926 (1952).

This case presents an appropriate opportunity for this Court to address the question whether intentional invasions of the defense camp by overzealous prosecutors will -- or will not be -- tolerated.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2, 1991

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 464—August Term, 1990

(Submitted After Remand September 24, 1990
Decided January 23, 1991)

Docket No. 89-1106

UNITED STATES OF AMERICA,

Appellee,

—against—

MARTIN SCHWIMMER,

Defendant-Appellant.

Before:

MINER and ALTIMARI, *Circuit Judges*,
and GRAY, *District Judge*.*

Following remand for hearing on issue of violation of attorney-client privilege, appeal from judgment of United States District Court for the Eastern District of New York (McLaughlin, *J.*), convicting defendant-

* Hon. William P. Gray, United States District Judge for the Central District of California, sitting by designation.

appellant, after jury trial, of racketeering conspiracy, receiving illegal payments to influence the operations of employee benefit plans, conspiracy to defraud the United States and income tax evasion.

Affirmed.

NATHAN Z. DERSHOWITZ, New York, NY (Victoria B. Eiger, Dershowitz & Eiger, New York, NY, Alan M. Dershowitz, Cambridge, MA, Daniel R. Williams, of counsel) *for Defendant-Appellant.*

ANDREW J. MALONEY, United States Attorney for the Eastern District of New York, New York, NY (Louis M. Fischer, Department of Justice, Washington, DC, of counsel) *for Appellee.*

MINER, *Circuit Judge*:

Defendant-appellant Martin Schwimmer appeals from a judgment of conviction entered after a jury trial in the United States District Court for the Eastern District of New York (McLaughlin, *J.*). Schwimmer was convicted of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(d) (1988), receipt of illegal payments to influence the operations of employee benefit plans, 18 U.S.C. § 1954 (1988), conspiracy to defraud the United States, 18 U.S.C. § 371 (1988), and income tax evasion, 26 U.S.C. § 7201 (1988). The offenses all relate to the

receipt of commissions from a number of financial institutions for investing the funds of employee benefit plans in Certificates of Deposit issued by the institutions.

Schwimmer argues that his sixth amendment right to counsel was violated when the government intentionally obtained from his accountant information protected by the attorney-client privilege. He also contends that the district court erred in instructing the jury that, whether or not he was a formally-designated agent or counsel of the employee plans allegedly victimized, he was subject to the provisions of 18 U.S.C. § 1954 if his investment advice significantly influenced the investment decisions of the plans. Schwimmer argues further that the trial court improperly instructed the jury that he was required to disclose his commissions to an employee benefit plan for which he acted in order to come within the "bona fide compensation" exception provided in 18 U.S.C. § 1954.

In *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989) ("*Schwimmer I*"), we remanded for an evidentiary hearing on the attorney-client privilege issue. After that hearing, the district court found that no violation of the privilege had occurred because no use or derivative use of privileged information was made by the government.

We hold that, on the basis of the additional evidence adduced at the hearing, the district court correctly found that no violation of the attorney-client privilege warranting a reversal of Schwimmer's conviction had occurred. Regarding the challenge to the jury instructions, we hold that the district court did not misconstrue either the scope of 18 U.S.C. § 1954 or the statute's definition of

"bona fide" compensation. Accordingly, we affirm the judgment.

BACKGROUND

Familiarity with *Schwimmer I*, where we described in detail the investigation and conviction of Schwimmer, is presumed. Here, we recite only those facts relevant to this appeal, as well as additional facts established at the evidentiary hearing.

In *Schwimmer I*, we remanded Schwimmer's case to the district court for an evidentiary hearing because there was insufficient evidence in the record to determine whether the government had obtained information by invading the attorney-client privilege, and whether any information that might have been obtained was used to prepare the prosecution's case. We directed the court to determine whether the government's case was in any respect derived from a violation of the attorney-client privilege and, if so, to determine what use was made of the derivative information and whether that use affected a substantial right of the appellant. *Schwimmer I*, 892 F.2d at 243-45.

On March 2 and 12, 1990, Judge McLaughlin conducted evidentiary hearings on the attorney-client privilege issue and found that no direct or indirect use of privileged information by the government had occurred.

Judge McLaughlin focused on meetings between Schwimmer's accountant and government representatives occurring on April 26, May 6, and August 18, 1988, and on copies of the accountant's workpapers that the government had obtained. The accountant, Ralph Glickman, had been hired by Schwimmer and his co-defen-

dant, Mario Renda, to assist in the preparation of their defense, and the workpapers described the allocation between the two men of the commissions they received for investing the funds of employee benefit plans.

Based on the testimony of government agents Frank Devine and Eugene Brozen, the district court found that the information derived from the meetings of April 26 and May 6 was not used to prepare for the prosecution of Schwimmer. Rather, the meetings were conducted to determine a reasonable forfeiture amount for co-defendant Renda, who had pleaded guilty, and there was little, if any, reference to Schwimmer. Regarding the August 18 meeting, the district court heard uncontroverted testimony from Assistant United States Attorney ("AUSA") Bruce Maffeo that he had cautioned Glickman at the outset of the meeting not to disclose any information regarding conversations with Schwimmer, and that no inquiries into such confidential communications between Glickman and Schwimmer were made.

The court determined that there had been no derivative use of the information contained in the workpapers examined and copied at Glickman's office. Agent Brozen, who had retrieved the papers, testified that he had told AUSA Maffeo that the workpapers contained "nothing new" and that they never had discussed the matter again. Agent Devine, who along with Brozen was responsible for investigating the financial aspects of the case, testified that he never was in possession of the workpapers and never had discussed them with Brozen. AUSA Maffeo testified that the first time he had looked at the workpapers was the day of the hearing on

remand, and that, while preparing to prosecute Schwimmer, he had considered their acquisition a "non-event."

The district court also found that the workpapers had not been used by the prosecution either to prepare for cross-examination of witnesses or to gain an understanding of the strengths and weaknesses of its case so that evidence could be presented in the light most favorable to the government. The cross-examination of defense witnesses in the case was conducted entirely by AUSA Alan Friedman. Both Maffeo and Brozen testified that Friedman had neither seen the workpapers nor discussed the workpapers with them. Similarly, the record contained no evidence that the government used the papers to structure its presentation of evidence. Rather, AUSA Maffeo testified that the government was ready for trial in March of 1988, well before the workpapers were obtained.

Finally, Judge McLaughlin rejected Schwimmer's contention that the workpapers had provided new information used by the government to alter the figures on its spreadsheets. Judge McLaughlin found that, although several figures were different, the substance of the workpapers and of the government's original spreadsheets was the same. Alterations that had been made to the government's spreadsheets were predicated not upon Glickman's workpapers, but upon Glickman's negotiations with the government regarding the amount of Renda's forfeiture and upon the independent cooperation of a business associate of Renda.

We think the district court's rulings regarding the attorney-client privilege and the jury instructions given at the trial were correct.

DISCUSSION

A district court's determination of whether the government improperly has used privileged information in a criminal prosecution is an issue of fact that will not be reversed unless the district court's finding is clearly erroneous. *United States v. Gallo*, 863 F.2d 185, 190 (2d Cir. 1988), *cert. denied*, 489 U.S. 1083 (1989). The government must demonstrate that the evidence it uses to prosecute an individual was derived from legitimate, independent sources. *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972). We believe that the district court's finding that no privileged information was used by the government in its prosecution of Schwimmer was not clearly erroneous because it is amply supported by the evidence produced at the hearing.

Relying on *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973), Schwimmer argues that even the indirect use of privileged information by the prosecution is prohibited. However, we have expressly rejected the *McDaniel* holding as being too restrictive. *See United States v. Rivieccio*, No. 89-1581, slip op. at 7232 (2d Cir. Nov. 2, 1990); *United States v. Mariani*, 851 F.2d 595, 600 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1654 (1989). In *Mariani*, we held that the mere "tangential[ ] influence[ ] [that privileged information may have on] the prosecutor's thought processes in . . . preparing for trial" was not an unconstitutional use. 851 F.2d at 600. Schwimmer contends that possession of the information contained in the workpapers allowed the government to confirm the information it had already acquired on its own; however, this use would not require reversal because confirmatory use is not prohibited under the circumstances of this case. *See id.* at 601. Here, the find-

ings of the district court indicate that, at most, any influence on the government's case by information obtained at the interviews or from the workpapers was "wholly conjectural and insubstantial." *Id.* This does not constitute an improper use. *Rivieccio*, No. 89-1581, slip op. at 7233.

Schwimmer also contends that the intentional intrusion into the attorney-client domain that occurred when the government agents obtained the workpapers requires an automatic reversal of his conviction. Although such an intentional intrusion warrants careful scrutiny, this Circuit never has gone so far as to adopt the per se rule for which Schwimmer argues. *United States v. Gartner*, 518 F.2d 633, 637 (2d Cir.), *cert. denied*, 423 U.S. 915 (1975). Rather, we have held that, unless "the conduct of the Government has . . . been . . . manifestly and avowedly corrupt," *Gartner*, 518 F.2d at 637, a defendant must show prejudice to his case resulting from the intentional invasion of the attorney-client privilege. *United States v. Dien*, 609 F.2d 1038, 1043 (2d Cir. 1979); *see also United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985).

Here, we find that the prosecution's conduct was not manifestly corrupt. Glickman was cautioned not to reveal confidential communications during the course of the interviews with government attorneys and investigators. Moreover, although the agents obviously obtained the workpapers intentionally, Schwimmer suffered no prejudice as a result. The hearing evidence demonstrated that no preview of defense strategy was derived from the workpapers and that no other violative use of privileged information had occurred.

Finally, we turn to the objections to the jury instructions noted in *Schwimmer I* but not addressed in that opinion. Schwimmer was convicted of violating 18 U.S.C. § 1954, which prohibits the receipt of illegal payments to influence the operations of employee benefit plans. The statute applies to, *inter alia*, "an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan . . ." *Id.* § 1954(1). At the trial's conclusion, the jury was instructed that even if Schwimmer was not designated formally as an agent or counsel to the employee benefit plans, he was subject to section 1954 if his advice had a significant influence on the plans' investment decisions. Schwimmer objected, maintaining that he was outside the scope of the statute because he did not hold any of the enumerated positions. A defendant need not formally hold one of the enumerated positions to fall within the statute's coverage, however. Section 1954's "proscription extends to 'all persons who exercise control, direct or indirect, authorized or unauthorized[,] over [a plan],' " *United States v. Robilotto*, 828 F.2d 940, 946 (2d Cir. 1987) (quoting *United States v. Palmeri*, 630 F.2d 192, 199 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981)), *cert. denied*, 484 U.S. 1011 (1988).

Here, the trial evidence amply demonstrates that Schwimmer regularly gave financial advice to the employee benefit plans and invested their funds, indicating that he exercised, at a minimum, indirect control over the plans' investments. A trustee of Local 38's benefit plans testified that Schwimmer had been the financial advisor, with authority to make investment decisions, for Local 38's plans for about fifteen years. The trial evidence also showed that, from 1981 to 1986, Schwimmer had been the sole financial advisor to Local

810, investing more than $72 million on the fund's behalf.

Schwimmer's contention that the court erred by instructing the jury that evidence of actual control was not necessary to bring a defendant within the reach of the statute is also without foundation. We have held that "section 1954 . . . does not necessarily require proof that the malefactor actually possessed the ability to influence a welfare fund's investment decisions," *Robilotto*, 828 F.2d at 946, but rather, the statute "proscribe[s] 'acceptance of payment with the stated purpose of exercising one's influence . . . , regardless of capacity to do so,' " *id.* (quoting *United States v. Soures*, 736 F.2d 87, 90 (3d Cir. 1984), *cert. denied*, 469 U.S. 1161 (1985)). Here, not only did Schwimmer represent that he had the capacity to influence the employee benefit plans' investment decisions, as two witnesses at trial attested, but he actually advised the plans and made investments on their behalf. Clearly, his conduct is proscribed by section 1954.

Schwimmer also argues that the court's instruction with regard to Local 810, that compensation must be disclosed in order to fall within section 1954's "bona fide" compensation exception, was erroneous. In the jury charge, the court defined "bona fide" to mean "in good faith or without deceit or fraud." Later, in response to a jury request for clarification of the law governing Schwimmer's commissions on Local 810's investment activities, the court instructed that a fiduciary must disclose the actual commission he is charging in order to qualify for the bona fide compensation exception.

18 U.S.C. § 1954, prohibiting the receipt of fees to influence employee benefit plan operations, contains an exception allowing bona fide compensation "for services actually performed in the regular course of [the] duties" of those who exercise influence over the plan. "Bona fide" literally means in good faith, exclusive of fraud or deceit. It cannot be said that one who receives a commission from a financial institution for placing employee benefit plan funds, without disclosing to the plan the actual commissions received, is acting in good faith. Moreover, Schwimmer's interpretation weakens the force of the statute through which Congress intended to regulate strictly the administration and operation of employee benefit plans. *See* H.R. Rep. No. 998, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. & Admin. News 1532, 1532-36. The evidence reveals that the trustees of Local 810 did not know that Schwimmer was receiving compensation from financial institutions through First United, the vehicle used by Schwimmer and his co-defendant to conduct their business. At trial, Local 810's comptroller testified that he assumed Schwimmer was receiving fees from a source other than the Local, but that he did not actually learn of Schwimmer's commissions until an investigation by Local 810 was conducted. Because section 1954 uses broad language to protect plan beneficiaries from dishonest or unfaithful fiduciaries, it seems clear that the statute was meant to reach Schwimmer's intentional failure to inform the trustees of Local 810 that he was extracting a commission from the placement of their investments. *See United States v. Romano*, 684 F.2d 1057, 1064 (2d Cir.), *cert. denied*, 459 U.S. 1016 (1982).

We have examined Schwimmer's remaining contentions and find them to be without merit.

CONCLUSION

The judgment of conviction is affirmed in all respects.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1411—August Term, 1988

(Argued August 18, 1989 Decided December 27, 1989)

Docket No. 89-1106

UNITED STATES OF AMERICA,

Appellee,

—against—

MARTIN SCHWIMMER,

Defendant-Appellant.

Before:

MINER and ALTIMARI, *Circuit Judges,*
and GRAY, *District Judge.**

Appeal from judgment entered in United States District Court for the Eastern District of New York (McLaughlin, *J.*) convicting defendant-appellant, after jury trial, of racketeering conspiracy, receiving illegal payments to influence the operations of employee benefit plans, con-

* Hon. William P. Gray, United States District Judge for the Central District of California, sitting by designation.

spiracy to defraud the United States and income tax evasion.

Remanded for hearing to determine whether attorney-client privilege was violated by government's use of documents and information furnished by accountant hired by attorneys conducting joint defense.

NATHAN Z. DERSHOWITZ, Esq., New York, New York (Victoria B. Eiger, Esq., Dershowitz & Eiger, New York, New York, Robert S. Fink, Esq., Kostelanetz Ritholz Tigue & Fink, New York, New York, and Alan M. Dershowitz, Esq., Cambridge, Massachusetts, of counsel), *for Defendant-Appellant.*

LOUIS M. FISCHER, Esq., Brooklyn, New York (Andrew J. Maloney, Esq., United States Attorney for the Eastern District of New York, Bruce Maffeo, Esq., Alan Friedman, Esq., United States Department of Justice, Organized Crime Strike Force, Brooklyn, New York, of counsel), *for Appellee.*

MINER, *Circuit Judge*:

Defendant-appellant Martin Schwimmer appeals from a judgment of conviction entered after a jury trial in the United States District Court for the Eastern District of New York (McLaughlin, *J.*). The offenses of conviction—

one count of conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(d) (1982); seventy-six counts of receiving illegal payments to influence the operations of employee benefit plans, 18 U.S.C. § 1954; one count of conspiracy to defraud the United States, 18 U.S.C. § 371; and six counts of income tax evasion, 26 U.S.C. § 7201—all relate to the receipt of commissions for investing the funds of employee benefit plans in Certificates of Deposit issued by various banks.[1]

Schwimmer argues that the trial court erred in instructing the jury that, whether or not he was a formally constituted agent or counsel of the employee plans allegedly victimized, he was subject to the provisions of 18 U.S.C. § 1954 if his investment advice had a significant influence on the investment decisions of the plans. The government contends that the jury properly could find Schwimmer to be an agent or counsel if it determined he had significant influence on investment decisions, and that he clearly was an agent of the plans he advised for an hourly fee.

Schwimmer argues also that the district court erred in instructing the jury that he was required to disclose his commissions in order to come within the "bona fide compensation" exception provision of 18 U.S.C. § 1954. The government responds that the exception, which allows compensation for services actually rendered to an employee benefit plan, requires disclosure of financial activities involved in administering the plan, to the end

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1 Appellant was sentenced on February 14, 1989 to a term of imprisonment of ten years, a term of probation of five years, fined $1.62 million, ordered to forfeit the sum of $4.5 million, and pay a special assessment of $4,050. *See United States v. Schwimmer*, 882 F.2d 22 (2d Cir. 1989) (requiring testimony before grand jury after conviction).

that beneficiaries might make proper judgments as to whether the compensation is bona fide.

Finally, it is Schwimmer's contention that he was entitled to a hearing to determine whether his attorney-client, sixth amendment and work product privileges were violated by the use of information, documents and grand jury testimony furnished by an accountant hired to assist the attorneys representing Schwimmer and a co-defendant in the conduct of a joint defense. The government's response to this contention is that a hearing was unnecessary because the trial court properly gleaned from the record sufficient information to determine that there was no invasion of the attorney-client privilege. We think that the record is insufficient to support the perfunctory findings of the district court with respect to the privilege issue, and we remand for a hearing and detailed findings on that issue, retaining jurisdiction of the appeal pending completion of the proceedings hereby ordered in the district court.

BACKGROUND

In 1979 Mario Renda formed a corporation known as First United Fund, Ltd. ("First United") to engage in the business of placing Certificate of Deposit ("CD") investments in small banking institutions throughout the United States. The banks and savings and loan associations to which the investments were directed paid a broker's commission to First United. Renda was successful in finding investors and soon hired a number of account executives to contact financial institutions needing cash, offering competitive interest rates and willing to pay for the services of First United. Associated with Renda was Joseph DeCarlo, who attended to the financial records of the business and, until the advent of computerization at First

United, sent hand-typed bills for commissions. Early in 1981, Renda and DeCarlo met Schwimmer at a computer store, fell into a conversation with him, and learned that he too was in the business of placing funds for institutional investors. Renda and Schwimmer joined forces shortly thereafter.

Schwimmer had been the investment adviser to four employee benefit plans covering members of Local 38, Sheetmetal Workers International Association ("Local 38"), since 1971. He was paid an hourly fee for his services and agreed that any commissions earned on investment transactions would be reported to Local 38 and used to offset his fees. The guidelines for investing furnished by the trustees of the plans required low risk investments, primarily federally insured CDs. Schwimmer had complete authority to place the assets of the plans, and his annual reports to the trustees were general in nature, without any breakdown of the investments by amount or location. In 1981 Schwimmer became the sole investment adviser to two employee benefit plans covering members of Local 810, International Brotherhood of Teamsters ("Local 810"). Dennis Silverman, administrator of the plans and president of Local 810, advised the union's comptroller that Schwimmer would give him instructions for wiring money to various banks for deposit in CDs. Schwimmer was not paid a fee for his services by Local 810 or the plans, and did not advise them that he was compensated through commissions paid by the banks.

Initially, Schwimmer made only short-term investments through First United under an agreement with Renda calling for an equal division of the commissions. Those investments were made on behalf of the Local 38 plans and some individuals for whom Schwimmer acted. The commis-

sions, negotiated by Renda, were payable at the inception of the deposit. DeCarlo sent the bills for the commissions to the bank, and Schwimmer submitted invoices for his share of the commissions to First United. Soon after he became adviser to the Local 810 plans, Schwimmer advised Renda that he was in a position to place large sums of union funds in long-term investments. He advised Renda that it would be necessary to make payments to "his people" in connection with this business, and the two agreed that they would deduct 7/8 of a point from the commission for that purpose and continue to divide the balance of the commission equally. Schwimmer's "people" presumably were union officials.

Toward the end of 1981, Schwimmer and Renda developed a system of off-the-book accounts for their long-term investment commissions. This system entailed the opening of separate bank accounts to receive deposits of these commission payments and thereby by-pass the regular First United accounts. The separate accounts were non-interest bearing, closed every six months, and not reflected on the books of First United. The institutions paying commissions were directed to wire payment to the appropriate off-book accounts, which were established at six banks during the period 1981-1984. The accounts were not reported to the Internal Revenue Service or First United's outside accountants. The long-term investments for the benefit plans of Locals 38 and 810 were recorded for a time in a notebook kept by DeCarlo. The bills for commissions on these investments, ordinarily computer-generated, were typed separately and forwarded to the appropriate institution at DeCarlo's direction. In order to forestall claims on the commissions by First United account executives, Renda and DeCarlo told the executives that one point of the commission was being paid to

the unions. Similarly, Renda told some banking institutions that the union would receive a "discount" on the commissions.

When First United's accountants performed an audit of the company in 1983, Renda told them that $2,700,000 in commissions was due the company on union benefit plan transactions concluded in 1981 and 1982. Renda caused those commissions to be paid into First United's regular, on-the-record account. No prior or subsequent commission payments on the union funds were so reported. Schwimmer received his share of commissions from the regular accounts in the form of "consulting fees." Between December 1981 and December 1984, Schwimmer and Renda placed $72,910,000 for the Local 810 benefit plans and $22,985,487 for the Local 38 benefit plans in long-term CDs issued by approximately twenty banks and savings and loan associations. Commissions on these deposits totalled $16,520,375, which Schwimmer and Renda shared, subject only to the 7/8 point deductions needed to pay Schwimmer's "people." For more than two years, beginning in January of 1982, Schwimmer cashed First United checks on a regular basis at the Better Farm Supermarket in Elmont, New York. In all, 210 checks totalling over $1,900,000 were cashed during that period. From December, 1981 through March of 1984, Schwimmer cashed First United checks totalling $1,212,725 at Nu Service Tobacco. All the cashed checks represented shares of commissions on long-term union benefit plan investments. Schwimmer cashed other checks signed by Renda in order to make the 7/8 point payments.

Although Schwimmer met annually with the trustees of the Local 38 benefit plans, it was not until 1986 that he reported for the first time that some of the CD investments

he had made were not insured. His previous annual report had omitted any reference to the problems of Old Court Savings and Loan Association, a failed institution holding more than one-quarter of the investment funds of the Local 38 benefit plans. In late 1986 the trustees of the plans learned from their counsel that Old Court had failed and that the funds were in jeopardy. Schwimmer then reported that the investments in Old Court were not insured by the federal government, contrary to the trustees' instructions. Pressed by the trustees for information regarding his relationship with brokerage houses, Schwimmer ultimately signed a letter representing that he had not received any commissions or compensation from any broker for placing CDs for any Local 38 benefit plan. At a trustees' meeting in December of 1986, he specifically represented that he did not conduct any Local 38 business through First United Fund. Not only were the representations untrue, but Schwimmer also had failed to offset the hourly fees for investment advice paid by Local 38 with the commission compensation he received from First United, as required by his agreement with the union.

Local 810 and its benefit plans had no agreement with Schwimmer regarding payment for investment services. The union's comptroller, Gilman, assumed that Schwimmer was receiving commissions from some source but did not think that it was his function to inquire. Even after it was reported to the union that commissions had been paid, the union was unaware of the amounts involved. Gilman considered Schwimmer to be a broker who produced investment opportunities to be accepted or rejected by the plans and sometimes called local banks to compare their interest rates with those offered by Schwimmer. On at least one occasion, a bank offered a CD interest rate higher than that ultimately received by the Local 810 plans

because the commissions that were arranged reduced the return to the plans.

When the government began its investigation into their employee benefit plan investment activities, Schwimmer and Renda each retained counsel. Schwimmer retained the law firm of Kostelanetz Ritholz Tigue & Fink, and was represented principally by Robert S. Fink of that firm. Renda retained the law firm of Russo, Silverman and Vitaliano and was represented principally by Ronald Russo and Larry Silverman of that firm, which also represented the interests of First United. Schwimmer, Renda and their attorneys agreed to cooperate in all matters of mutual concern related to the investigation and to the defense of any charges that might be made against them. The attorneys decided that it was necessary to hire an accountant to analyze the financial transactions in which their clients had engaged as well as the tax consequences of those transactions. Ralph Glickman, a certified public accountant, was hired by attorney Silverman in June of 1984 to serve the joint interests.

Although Silverman, attorney for Renda and First United, worked most closely with Glickman, Schwimmer's attorney, Fink, also met with the accountant from time to time. Fink told his client to speak freely with Glickman and that any conversations with the accountant would be protected by the attorney-client privilege. Schwimmer spoke to Glickman at some length on the occasion of their first meeting, which took place at the offices of First United in June of 1984. Present for all or part of that meeting, besides Glickman and Schwimmer, were Renda, Silverman, Ronald Russo of Silverman's law firm, Stewart Steinberg, another attorney for Renda, Kenneth Gould, a partner of Glickman, and Joseph DeCarlo.

Schwimmer spoke to Glickman on several occasions thereafter. He also furnished information to the accountant through Fink and Silverman.

On July 2, 1987, and again on July 27, 1987, pursuant to a subpoena, Glickman appeared before the grand jury that ultimately returned an indictment charging Schwimmer and Renda in eighty-nine counts with racketeering conspiracy, illegal pension and welfare fund payments, kickbacks to union officers, embezzlement, obstruction of justice and tax evasion. Glickman testified that he examined certain records after he was hired by Silverman but, in response to a request to describe the records, responded as follows: "I don't believe I am permitted to specify exactly what records I looked at or what I did for Mr. Silverman." He then testified that he provided commission income figures to David Cohen, Renda's accountant, for the preparation of Renda's 1983 and 1984 personal income tax returns. Glickman said that the figures were acquired "[f]rom the analysis that we made for Mr. Silverman" and were provided verbally to Mr. Cohen for inclusion in the tax returns. Glickman derived the figures from certain work papers, which he never showed to Cohen and refused to discuss before the grand jury.

Glickman also testified before the grand jury that he provided Cohen with certain information for preparation of the 1984 tax returns of a corporation known as "First United Air, Inc." This corporation owned and leased out an aircraft and received certain CD commission income, and its stock was held in equal shares by Schwimmer and Renda. When asked to identify the work papers used to prepare the First United Air returns as well as the personal returns, Glickman responded: "The work papers were prepared. As to the details in the work papers, that I can-

not discuss." When asked specifically whether CD purchases by Locals 38 and 810 were noted in those materials, he declined to answer. In response to a question pertaining to his review of the records of an account opened in the name of First United Fund, Ltd. and later changed to the name of First United Air in the Connecticut Bank and Trust Co., the accountant replied: "I believe that I am not permitted to discuss that because this was an analysis that was prepared for the attorneys and under client-attorney privilege I am not permitted to discuss that." The Assistant United States Attorney conducting the grand jury proceeding responded: "We certainly respect that privilege, sir."

On August 18, 1988, almost three months after Mario Renda entered a plea of guilty to Counts One (racketeering) and Eighty-three (tax evasion) of the Indictment and agreed to testify at the trial of his co-defendant, Glickman met with the Assistant United States Attorney in charge of the prosecution. According to the prosecutor, Glickman at that time advised that he had arrived at the figures shown on the 1983 and 1984 Renda personal returns and the 1984 First United Air returns by examination of bank statements pertaining to the off-book accounts as well as the records furnished by Joseph DeCarlo, all of which had been available to the government previously. The prosecutor then directed Glickman to turn over to the case agents the "schedules" the accountant had prepared. He contends that he never has seen the schedules but "was told by the agents that they contain nothing more than a scheduling of records previously acquired and examined by the government during the grand jury investigation."

Schwimmer contends that the work papers, or schedules, included privileged information not previously avail-

able to the government. Although the work papers were not offered in evidence,[2] Schwimmer asserts that the government used the information contained therein to prepare questions, decide who should be called as witnesses and for trial preparation generally. In short, Schwimmer takes the position that the work papers were of great assistance to the government in assembling, organizing and proving its case. Schwimmer points to two of these documents to demonstrate that the government acquired information in the form of figures and allocations not available from bank records or records previously in the government's possession. One item, entitled "Analysis of Commissions," contains a breakdown of commissions for both Schwimmer and Renda, and apparently includes the "bottom line" figure furnished verbally by Glickman to Cohen for the 1984 Renda personal returns. Also included in this schedule were the names of the business entities that cashed First United checks at Schwimmer's behest. The other item consists of two summary worksheets, supported by detailed worksheets, allocating commissions between Schwimmer and Renda in 1983 and 1984. Schwimmer contends that the information contained in this item also was not available from the bank records or any other materials previously available to the government in any form. According to Schwimmer, the two items were prepared by the accountant solely for purposes of the joint defense.

The district court deferred until the close of the testimony Schwimmer's motion to dismiss the indictment for

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2 The work papers in question were submitted to the trial court for *in camera* inspection on the issue of attorney-client privilege. They were not made a part of the original record but have since been turned over to counsel for defendant, who has furnished them to us, without objection, in the form of a supplemental appendix.

violation of the attorney-client privilege or for a hearing to determine whether there had been such a violation and, if so, the extent thereof. Prior to instructing the jury, the court ruled upon the motion as follows:

> Having heard the testimony and evidence presented during the trial, and having now inspected the grand jury testimony and the documents which Glickman gave to the government, I now determine that the government has not violated the defendant's attorney-client privilege.
>
> As to the grand jury testimony, it dealt almost exclusively with Glickman's participation in the preparation of Renda's personal tax returns for 1983 and four and the corporate tax return of First United for '84.
>
> References to Mr. Schwimmer were negligible and amounted to virtually nothing except to say that Glickman had in fact met Schwimmer.
>
> As to the documents, similarly, these documents submitted by Glickman to the government were merely schedules used to prepare First United's tax return or schedules setting forth the activities of the several First United Fund bank accounts. Thus, I find that has been no invasion of Schwimmer's defense camp by Glickman.

DISCUSSION

Narrowly defined, riddled with exceptions, and subject to continuing criticism, the rule affording confidentiality to communications between attorney and client endures as the oldest rule of privilege known to the common law. *See*

generally, 2 Weinstein and Berger, *Weinstein's Evidence* ¶ 503[02]-503(d)(5)[01]; Fisch on New York Evidence § 517 (2d ed. 1977). Even in its debilitated form, however, it provides essential support for the constitutional right to the assistance of counsel. Without the attorney-client privilege, that right and many other rights belonging to those accused of crime would in large part be rendered meaningless. Designed "to encourage full and frank communication between attorneys and their clients," this rule of confidentiality "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It also recognizes that a lawyer's "assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *see also Trammel v. United States*, 445 U.S. 40, 51 (1980); *Fisher v. United States*, 425 U.S. 391, 403 (1976).

The attorney-client privilege generally forbids an attorney from disclosing confidential communications that pass in the course of professional employment from client to lawyer. *See generally* 81 Am. Jur.2d *Witnesses* § 172 (1976). The relationship of attorney and client, a communication by the client relating to the subject matter upon which professional advice is sought, and the confidentiality of the expression for which the protection is claimed, all must be established in order for the privilege to attach. *Re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032 (2d Cir. 1984). The privilege also is held to cover communications made to certain agents of an attorney, including accountants hired to assist in the rendition of legal services. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). As to such agents, "[w]hat is vital to the privilege is that

the communication be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer.*" *Id.* at 922 (emphasis in original). Information provided to an accountant by a client at the behest of his attorney for the purposes of interpretation and analysis is privileged to the extent that it is imparted in connection with the legal representation. *Id. See generally* Annotation, *Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Third Person*, 14 A.L.R. 4th 594, 635.

The joint defense privilege, more properly identified as the "common interest rule," *see generally* Capra, *The Attorney-Client Privilege In Common Representations*, 20 Trial Lawyers Quarterly, Summer 1989, at 20, has been described as "an extension of the attorney client privilege," *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987). It serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. *See United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28 (1st Cir. 1989). Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected. *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir.), *cert. denied*, 474 U.S. 946 (1985); *Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986). "The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter," Capra, 20 Trial Lawyers Quarterly, at 21 (citation omitted), and it is therefore unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privi-

lege to apply, *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987), *vacated in part on other grounds*, 842 F.2d 1135 (9th Cir. 1988) (en banc). Neither is it necessary for the attorney representing the communicating party to be present when the communication is made to the other party's attorney. *Matter of Grand Jury Subpoena*, 406 F. Supp. 381 (S.D.N.Y. 1975); *cf. Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965).

As in all claims of privilege arising out of the attorney-client relationship, a claim resting on the common interest rule requires a showing that the communication in question was given in confidence and that the client reasonably understood it to be so given. *See United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986); *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984). The protection afforded by the privilege extends to communications made in confidence to an accountant assisting lawyers who are conducting a joint defense on behalf of the communicating clients. *See United States v. Judson*, 322 F.2d 460 (9th Cir. 1963). It applies "regardless of the manner in which it is sought to put the communications in evidence, whether by direct examination, cross-examination, or *indirectly as by bringing out facts brought to knowledge solely by reason of a confidential communication.*" 81 Am Jur.2d *Witnesses* § 194 (emphasis added). The burden of establishing the attorney-client privilege, in all its elements, always rests upon the person asserting it. *In re Horowitz*, 482 F.2d 72 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973); *von Bulow v. von Bulow*, 811 F.2d 136, 146 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987).

Schwimmer has carried the burden of establishing that the information he furnished to Glickman, the accountant

hired by Renda's attorney to serve the joint interests of Renda and himself, was protected by the attorney-client privilege. Schwimmer was directed by his attorney, Fink, to speak freely with Glickman, who had been hired by Silverman, Renda's attorney, on behalf of both clients. The attorneys had agreed to cooperate in all matters of mutual concern relating to the investigation by the government then in progress, and Fink represented to Schwimmer that any conversations with Glickman would be privileged. The common interest rule clearly is applicable here, since the information given by Schwimmer to Glickman was imparted in confidence for the ultimate purpose of assisting attorneys who had agreed upon and undertaken a joint strategy of representation, all of which was well understood by Schwimmer. Indeed, the government is willing to assume, for purpose of this appeal, "that appellant has a valid claim to the joint or common defense privilege." The government contends, nevertheless, that it obtained no information by invading that privilege. It is not so clear that this is so.

In his testimony before the grand jury, Glickman repeatedly invoked the attorney-client privilege when questioned concerning the records he examined, the work papers he prepared, and the analyses he formulated for the attorneys providing the joint representation. The Assistant United States Attorney conducting the grand jury proceedings at one point acknowledged that the privilege properly had been claimed. Yet, the same Assistant United States Attorney spoke with Glickman at some length at a meeting following Renda's guilty plea, presumably about matters relating to the investigation, and at that time directed the accountant to turn over to the case agents the schedules he had prepared. Neither the testimony of the accountant nor the schedules he delivered were offered in

evidence at Schwimmer's trial. Schwimmer contends, however, that information *derived* from these sources was used by the government, in violation of the attorney-client privilege, to prepare for trial. The *indirect* use of confidential information is what is challenged here. The government asserts that the accountant furnished *no* information not otherwise available to it. There is reason to question that assertion.

Although the government argues that the work papers furnished by the accountant consist only of schedules attached to the First United Air tax returns and schedules of checks written on several off-book First United Bank accounts, all unprivileged information available to the government, our review of the work papers reproduced in the supplemental appendix suggests other possibilities. Certain of these documents are not of the type ordinarily submitted with corporate tax returns, and others appear to contain information not ascertainable from bank records. For example, a work paper entitled "Analysis of Commissions," containing listings for Renda, Schwimmer and "Genl" appears to contain the "bottom line" figure furnished by Glickman to Cohen for Renda's 1984 personal tax return and related to the grand jury by the accountant. Glickman nonetheless refused to describe to the grand jury how that figure was arrived at, but the allocation is shown on the worksheet. Listed in the same worksheet, under Schwimmer's name, is "Nu Tobacco," one of the entities regularly used by Schwimmer to cash First United checks, with a corresponding dollar amount. Other worksheets contain allocations of commissions between Schwimmer and Renda, items not ordinarily part of corporate tax returns or available from bank records.

The district court found that, since the references to Schwimmer in Glickman's grand jury testimony were "negligible," and since the documents delivered to the government by the accountant were merely tax returns and schedules relating to bank accounts, there was "no invasion of Schwimmer's defense camp by Glickman." We think that, based on the documentation available to it, the district court should have conducted an evidentiary hearing to determine whether the government's case was in any respect derived from a violation of the attorney-client privilege in regard to confidential communications passing from Schwimmer to Glickman. We remand to the district court for such a hearing and, in the event of an affirmative finding, a determination as to what use was made of the derivative information and whether a substantial right of the appellant was affected. The panel will retain jurisdiction of the appeal pending completion of the hearing hereby directed and the return of the district court's findings of fact and conclusions of law on the issue remanded.

CONCLUSION

The matter is remanded to the district court for further proceedings consonant with the foregoing.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

MEMORANDUM
AND ORDER

MARTIN SCHWIMMER,

87 CR 423(SS)

Defendant.

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McLAUGHLIN, District Judge

During deliberations, questions were raised by the jury regarding the interpretation of the phrase "bona fide compensation" used in the context of 18 U.S.C. §1954.[1] The Court ruled that in order for the trustees of an employee benefit plan to determine whether compensation is bona fide, the trustees must be given full disclosure of the details of such compensation. The following embodies the Court's ruling.

Based on the questions asked by the jury,[2] I find that it [is] necessary to decide how "bona fide compensation" should be interpreted in

construing §1954.

The definition of bona fide which appears in the charge in serviceable,[3] see Final Jury Charge 22 (October 25, 1988), and is taken from Black's Dictionary. See Blacks Law Dictionary 223 (4th ed. 1951). The real problem, however, is how "Bona fide" should be defined and read in the context of §1954 and in light of that section's legislative history. That answer requires a study of the legislative history of §1954.

Section 1954 was enacted as part of the "Welfare and Pension Plans Disclosure Amendment Act of 1962." Pub. L. O.87-420, §17(e), March 20, 1962 (emphasis added). This act was found necessary when it became evident that the abuses in administering employee benefit plans that were supposedly remedied in the 1958 Welfare

and Pension Plan Disclosure Act were still occurring. See H.R. Rep. 998, 87th Cong., 2nd Sess., reprinted in 1962 U.S. Code Cong. & Admin. News 1532, 1533.

Before discussing those abuses I want to address the purpose of the 1958 Act. Section 2 of that Act states that" "it is desirable, in the interests of Employees and their beneficiaries . . ., that disclosure be made with respect to the operation and administration of [employee benefit] plans." (Emphasis added). The section goes on to say that it is the policy of the act "to require the disclosure and reporting to participants and beneficiaries of financial and other information with respect to the [plan]." (Emphasis added).

In 1961, after considering the effectiveness of the 1958 Act, Congress

passed the 1962 (Amendment) Act to supply, in the words of the House Report, the "enforcement teeth which are lacking in the existing law." As part of that legislation, Congress enacted §1954. The House report stated that "the need for [this provision] is plain" when one considers the findings leading to the passage of the "Douglas Bill" (the 1958 Act). See 1962 U.S. Code Cong. and Admin. News at 1538. Indeed, the congressional record echoes the need for §1954. See, e.g., 108 Cong. Rec. 1924 (1962) (remarks of Senator McNamara) ("The last important set of amendments [to the 1958 Act] establish criminal sanctions for violations of trust."); 108 Cong. Rec. 1739 (1962) (remarks of Representative Smith):

> The [1962] bill also makes kickbacks, bribery, and looting from these funds Federal felonies. These were

> the very abuses which initiated legislative action in this field and yet as the law stands now, none of these flagrant abuses are Federal crimes.

Senator Javits brought home the necessity for the 1962 Act:

> It seems to me that there is a fiduciary relationship imposed on anyone who is charged with the administration of a fraud, whether it is technically a fiduciary, like a bank or a trust company, or not; and that, therefore, if we were merely going to depend on the criminal statutes of accountability which relate to a fiduciary, we would not have this bill at all.
>
> The point is that we feel there must be in the Federal law greater sanctions than are inherent in the usual laws relating to fiduciaries, which are essentially State administered; hence the reason for the bill.

108 Cong. Rec. 1931 (1962).

The Douglas committee, which investigated the administration of Employee Benefit Plans, unearthed instance upon instance where exorbitant

and unreported commissions were paid to brokers and insurance companies doing business with union employee benefit plans. S. Rep. No. 1734, 84th Cong., 2d Sess. (1956). The ultimate conclusion of Douglas' investigation was that in order to deter and prevent these abuses, there must be full disclosure of the costs expended to administer and operate the plans. Id. In the words of Senator Douglas: "For sunlight is a great disinfectant. Investors and beneficiaries are entitled to the truth." See 108 Cong. Rec. 1937 (1962).

The legislative history, therefore, makes it clear that Congress set out to ban all conflict of interest payments when it enacted §1954, see U.S. v. Romano, 684 F.2d 1057, 1064 (2d Cir. 1982), by requiring all fiduciaries of benefit plans to be

honest and straight-forward when handling union funds. This, Congress felt, could only be obtained by requiring fiduciaries to disclose the financial activities involved in administering plan funds, and then, leaving it to the beneficiaries to decide whether their funds were being properly handled.

A review of §1954 itself proves this view of the statute correct. Throughout §1954, Congress consistently uses very broad language to protect plan beneficiaries from dishonest or unfaithful fiduciaries. See Romano, 684 F.2d at 1064. First, the statute encompasses almost every conceivable person who could deal with or administer a benefit plan. See §1954 (1)-(4). Then, the statute prohibits the receipt of any fee, kickback, commission, gift, loan, money, or thing

of value. Moreover, the statute punishes the receipt of any of these things either "because of," or with "the intent to be influenced" with respect to any decision concerning a benefit plan. Thus Congress was not only concerned with corrupt transactions as indicated with the "intent to influence" language, it also was concerned with fiduciaries of benefit plans taking advantage of their position in any way. See Romano, 684 F.2d at 1064. In short, Congress's broad language reflects its intent to reach all fiduciaries who profit as a result of their decisions to invest union funds. See id.

After reviewing the legislative history, the sparse case law, and the statute itself, I find that the only reasonable construction of bona fide is to require disclosure. In order for

beneficiaries to decide whether compensation to a fiduciary who handles the investment of union funds is bona fide, the beneficiaries must be told what the compensation is. It would be wholly inconsistent with the Act if a fiduciary could determine for himself what bona fide compensation should amount to. This decision must be left to the plan beneficiaries.

The second question asked by the jury is: if the defendant were charging an extraordinarily high commission, but the union knew about it, would that be bona fide? I believe it would because as long as there is full disclosure, the union is able to make its own contracts, agreements, or understandings.

SO ORDERED.

Dated: Brooklyn, New York
November 10, 1988

JOSEPH M. McLAUGHLIN,
U.S.D.J.

The Clerk shall make copies of this Order and shall serve them upon the parties.

FOOTNOTES

1. Section 1954 provides, in pertinent part, the following:

> Whoever being -- (4) a person who, or an officer, counsel, agent or employee of an organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to any of his actions, decisions, or concerning such plan or any person who directly or indirectly gives or offers, or promises to [give] or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods

> or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

(Emphasis added).

2. The jury's first question, which was rephrased by the court and adopted by the jury, is as follows: "So, that if you, the advisor, go out and you put it [the investment of union funds] somewhere where it is earning 18 percent and you tell the union it is making 17 percent, is that bona fide?" See Trial Transcript at 2487. (emphasis added) The jury's second question was: if the defendant were charging a very high commission but the union knew the amount, would that be bona fide? See Trial Transcript at 2488 (emphasis added).

3. The definition provided in the charge is as follows: "'Bona fide' means in good faith or without deceit or fraud."

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, MEMORANDUM AND ORDER

-against-

87 CR 423

MARTIN SCHWIMMER,

Defendant.

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McLAUGHLIN, District Judge

Defendant Martin Schwimmer moves this Court for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(c) on two grounds.

In the first ground, which concerns only Counts 32 to 77, defendant contends that the government failed to prove beyond a reasonable doubt that defendant was an agent to or counsel of Local 810's employee pension plans or that defendant was a person who provided benefit plan services to 810's pension plans. Defendant argues that the evidence demonstrates that

defendant merely acted as a "salesperson" who brcught a product (in this case, certificates of deposit ("CDs")) to Local 810. The Court has heard and rejected this argument on two previous occasions -- during the Rule 29 motion at the close of the government's case and during defendant's objections to the jury charge.

Nevertheless, once again, to decide this Rule 29 motion the Court must look at all of the evidence to determine if it was sufficient to support the jury's verdict. Because the motion is made after verdict, however, the Court must now view the evidence and the inferences therefrom in a light most favorable to the government.

Contrary to the defendant's contentions, the Court's review of the

record indicates that three witnesses -- not just one -- testified to the defendant's relationship to the Local 810 pension plans. Mario Renda and Joseph DeCarlo each testified that Schwimmer represented himself as a financial advisor to Local 810. In addition, their testimony indicated that Schwimmer advised them as to when Local 810 pension plans funds would be available for investment and the rate of interest and term of the investment.

The third witness, Steven Gilman, comptroller of Local 810, despite stating that Schwimmer was not an agent of or counsel to Local 810, testified that between 1981 and 1986 Schwimmer regularly advised Dennis Silverman, Local 810's president, on the current market availability of investments in certificates of deposit (Transcript of Trial ("Tr") 1490). Gilman testified

that Schwimmer regularly was asked to solve problems that arose with the plan's CD investments. (Tr.1555-62) Gilman further testified that it was Schwimmer's responsibility to secure the best rates of return on CD investments. (Tr.1595) Finally, Gilman testified that although no inquiry was made into Schwimmer's selection of banks or means of compensation for the investments, Local 810 pension plans increased their investments in CDs to $75 million, more than half of the pension plan's combined portfolios from 1981 to 1986.

There is, additionally, a consensual recording of a telephone conversation between Schwimmer and Dennis Silverman. In that conversation, Schwimmer is actually heard discussing several competing investment proposals and then advising

Silverman on which investment would be in Local 810's best interest.

The Court finds, based on this evidence, that there was more than enough evidence for the jury to conclude or infer, beyond a reasonable doubt, that Schwimmer was within the scope of §1954.

The legislative history makes it clear that §1954 applies to, among others, investment brokers who provide services to an employee benefit plan. See S. Rep. No. 908, 87th Cong. 1st Sess. 11 (1961). Schwimmer, by advising Local 810 on its investment decisions and then locating the bank where he investments would be made, plainly acted as an investment broker to Local 810's pension plans and, therefore, falls within §1954's "benefit services" category.

Moreover, the statute itself has

been construed to reach all persons with the capacity to influence, directly or indirectly, the use of employee benefit plan funds. See U.S. v. Robilotto, 828 F.2d 940, 946 (2d Cir. 1987); U.S. v. Friedland, 660 F.2d 919, 925 (3d Cir. 1981). Once again the evidence adduced at trial -- Gilman's testimony and the recorded telephone conversation -- clearly demonstrates that Schwimmer was capable of influencing decisions concerning the investment of CD's for Local 810.

Bona Fide Compensation

The second ground asserted by the defendant in support of his motion for judgment of acquittal is that the government failed to prove beyond a reasonable doubt that the fees paid to Schwimmer were not bona fide. In this connection, defendant asserts that the Court's instructions to the jury

regarding whether the fees paid Schwimmer were bona fide was erroneous.

The Court's instruction, in response to a question by the jury, was that in order for the trustees of an employee benefit plan to determine whether compensation is bona fide within the meaning of §1954, the trustees must be given full disclosure of the details of such disclosure. The basis for this instruction was detailed in a Memorandum and Order dated November 10, 1988. The Court has reviewed, and now reaffirms, that holding and charge to the jury.

In addition, notwithstanding the defendant's contention, the Court finds that the charge to the jury did not shift the burden of proof to the defendant. The Court, after charging the jury on bona fide compensation, left no doubt that the burden of proof

remained with the government on this element by following its response to the jury's question with the following admonition: "(W)hether or not there was disclosure to an appropriate official is one of the questions of fact which you, the jury will have to decide. Of course, the burden rests upon the government to satisfy you beyond a reasonable doubt that there was no fair disclosure." (Tr. at 2513)

Finally, based on the testimony of Gilman who stated that Local 810 was unaware of Schwimmer's compensation, the Court finds that there was sufficient evidence in the record to support the jury's verdict that the fees paid to defendant were not bona fide.

SO ORDERED.

Dated: Brooklyn, New York
February 14, 1989

JOSEPH M. McLAUGHLIN,
U.S.D.J.

The Clerk shall make copies of this Order and shall serve them upon the parties.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

MARTIN SCHWIMMER,

Defendant.

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MEMORANDUM AND ORDER

87 CR 423 (SS)

APPEARANCES:

Alan M. Friedman, Assistant U.S. Attorney, (Andrew J. Maloney, United States Attorney, E.D.N.Y.) for the government,

Dershowitz & Eiger, P.C., New York, N.Y. (Nathan Z. Dershowitz, Esq. of counsel) for defendant.

McLAUGHLIN, District Judge

PRIOR PROCEEDINGS

A jury convicted defendant of RICO conspiracy, 18 U.S.C. §1962(d); receiving illegal payments to influence the operations of employee benefit plans, 18 U.S.C. §1954; conspiracy to defraud the United States, 18 U.S.C. §371; and attempted tax evasion, 26

U.S.C. §7201. Defendant appealed his conviction arguing that, among other things, he was entitled to a hearing "to determine whether his attorney-client, sixth amendment and work product privileges were violated by the use of information, documents and grand jury testimony furnished by an accountant hired to assist the attorneys representing Schwimmer and a co-defendant in the conduct of a joint defense." United States v. Schwimmer, 892 F.2d 237, 238 (2d Cir. 1989).

The Second Circuit remanded the case to this Court for a hearing and findings of fact concerning the privilege issue. Id. at 239. Specifically, the Court of Appeals directed this Court to determine whether the government's case "was in any respect derived from a violation of the attorney-client privilege in regard

to confidential communications passing from Schwimmer to Glickman." Id. at 245. If the answer is yes, I am then to determine "what use was made of the derivative information and whether a substantial right of the [defendant] was affected." Id.

FACTS

Defendant Schwimmer's conviction resulted from the government's investigation of First United Fund, Ltd. ("First United"), a Long Island brokerage firm engaged in placing certificates of deposit for small banking institutions. The facts surrounding the first United investigation and Schwimmer's conviction have recently been reviewed in detail by the Second Circuit. See Schwimmer, 892 F.2d at 239-43. Familiarity with the Second Circuit's opinion is presumed.

Defendant and his confederate, Mario Renda, were involved in a financial scheme. The scheme involved the funneling of commissions derived from benefit plan investment activities into six bank accounts known as the "off book accounts." These accounts were not reflected on the books of First United and "were not reported to the Internal Revenue Service or First United's outside accountants." 892 F.2d at 240.

Defendant withdrew money from the off book accounts by negotiating checks from such accounts through cooperating cash-laden businesses. Businesses cashing checks included Nu-Service, All-County Tobacco, Crown Confection and various other entities owned by Allen Gouz.

In the early 1980's the government began investigating First United,

Schwimmer and Mario Renda. Upon learning that they were subjects of an investigation, Schwimmer and Renda each retained counsel. Schwimmer was represented by Robert S. Fink of Kostelanetz Ritholz Tigue & Fink. Mr. Renda was represented by Ronald Russo and Larry J. Silverman of Russo, Silverman and Vitaliano.

Schwimmer, Renda and their counsel cooperated in matters of mutual concern, thereby conducting a "joint defense." 892 F.2d at 244. In June 1984 attorney Silverman hired a certified public accountant, Ralph Glickman, to "analyze the financial transactions in which [Schwimmer and Renda] had engaged as well as the tax consequences of those transactions." 892 F.2d at 241.

Schwimmer's attorney, Robert S. Fink, instructed Schwimmer to "speak

freely" with Glickman. The Second Circuit found that Schwimmer communicated with Glickman orally and through counsel, but the Court made no finding as to the substance of such communications.

In October 1984 the government searched First United's offices pursuant to a warrant. As a result of the search, Internal Revenue Service ("IRS") Special Agent Francis R. Devine received various financial books and records, receipts, disbursement ledgers, canceled checks, wire transfer documents, a listing of bank accounts and debit and credit memoranda. (Tr.11)[1]

In late 1985 or early 1986, Agent Devine was joined in his investigation by IRS Special Agent Eugene L. Brozen.

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[1] The designation "Tr." in this opinion refers to the remand hearing transcript.

(Tr.44) Agents Brozen and Devine centered their investigation on documentary material recovered from First United's offices. (Tr.11)

Through their field investigations and through inspection of the canceled checks, agents Brozen and Devine were able to allocate proceeds from the off book accounts to the income of Schwimmer and Renda. (Tr.60) Agents Brozen and Devine then prepared a set of spreadsheets reflecting these allocations and the agents' calculations. In May 1987 the spreadsheets were "submitted to Washington" so it could be determined what tax charges, if any, should be brought against Schwimmer and Renda. (Tr.17, 86, 110)

On July 2, 1987 and July 27, 1987, accountant Glickman testified before the grand jury which ultimately

indicted Schwimmer and Renda. This was Mr. Glickman's first contact with the prosecution team. (Tr.17-18, 47, 132)

During his grand jury testimony, Mr. Glickman asserted the attorney-client privilege when asked to describe the records he had examined at the behest of attorney Silverman. 892 F.2d at 241. Based on the attorney-client privilege, Mr. Glickman also refused to answer questions pertaining to "the 1984 tax return of a corporation known as 'First United Air, Inc.'" Id.

Mr. Glickman did, however, testify before the grand jury that he provided commission figures for Renda's 1983 and 1984 tax returns to Renda's accountant, David Cohen. Glickman also testified that those figures were based on an analysis he performed for attorney Silverman and on certain work papers (the "Work Papers") that Glickman

refused to discuss before the grand jury. 892 F.2d at 241.

Thereafter Mario Renda decided to plead guilty. In connection with Renda's guilty plea, Glickman met with the prosecution on April 29, 1988 and May 6, 1988 to resolve the amount of forfeiture to be paid by Renda pursuant to his plea. Negotiations among the Government, Mr. Glickman, Mr. Renda and Renda's counsel led to an agreement by the conclusion of the May 6 meeting. (Tr.49, 135)

On August 18, 1988 a third meeting was held between Mr. Glickman and the prosecution. At this time Assistant United States Attorney Bruce Maffeo asked Glickman to describe what information he used to prepare the Work Papers. (Tr. 137, 147) Mr. Glickman stated that the Work Papers were based on a scheduling of bank accounts and

the work papers of Joseph DeCarlo. (Tr.137) (Mr. DeCarlo is a former First United employee who maintained the records of Schwimmer and Renda's financial scheme prior to DeCarlo's cooperation with the government in 1987. 892 F.2d at 239, 240. (Tr.137))

After the August 18 meeting, Mr. Maffeo instructed agent Brozen to inspect the Work Papers at Glickman's office. (Tr.138) Approximately one week later, agent Brozen and special Agent Marvin Friedman of the Department of Labor visited Mr. Glickman's office and examined the Work Papers. (Tr.56) After copying some the Work Papers, agent Brozen informed Mr. Maffeo that the Work Papers did not contain any new substantive information affecting the prosecution's case. (Tr.57, 153)

At the close of testimony in Schwimmer's original trial, I concluded

that neither Glickman's grand jury testimony nor the government's acquisition of the Work Papers led to a violation of Schwimmer's attorney-client privilege. Schwimmer appealed this conclusion and the Second Circuit remanded for a hearing to determine (i) whether the government's case was in any respect derived from a violation of Schwimmer's attorney-client privilege, (ii) what use, if any, was made of the privileged information, and (iii) whether such use affected a substantial right of defendant. 892 F.2d at 245.

DISCUSSION

I. THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege protects confidential communications between a client and his lawyer relating "to the subject matter upon which professional advice is sought . . ." Schwimmer, 892 F.2d at 243. In the

ordinary case there is but one lawyer and one client. Where multiple parties and their counsel conduct a cooperative defense of a common interest, the "joint-defense privilege" or "common interest rule" extends the attorney-client privilege to communications passing from one party to another party's lawyer. See Schwimmer, 892 F.2d at 242-43. In this case, the Second Circuit has already concluded that the common interest rule expands the attorney-client privilege to the joint defense team assembled by Schwimmer and Renda.

Again, in the ordinary case the privileged communications runs directly between the attorney and the client. As litigation becomes more complex, however, it is increasingly common for lawyers to turn to outsiders to interpret and analyze technical

information. Accountants are a classic illustration. As recognized by the late Judge Friendly "[a]ccounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases." United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961). Accordingly, communications are privileged when they are made to an accountant by a lawyer's client to enable the lawyer, with the technical assistance of the accountant, to render more informed legal advice. Schwimmer, 892 F.2d at 237; Kovel, 296 F.2d at 922.

Accountant Glickman was hired by Larry J. Silverman, attorney for Mario Renda, to analyze the financial transactions that were the subject of the government's investigation. 892 F.2d at 241. Because Schwimmer and Renda were conducting a joint defense,

communications made to Glickman by Schwimmer in furtherance of the joint defense were privileged, even though neither Schwimmer nor his attorney had retained Glickman. Id. at 244.

The Second Circuit found that Schwimmer did in fact communicate with Glickman, but it made no finding as to the substance of such communications. See id. at 244. The government now contends that there were no substantive communications between Schwimmer and Glickman and, therefore, that Schwimmer's attorney-client privilege could not have been violated. (Gov't Reply Letter at 2). Schwimmer maintains that because the Second Circuit found that Schwimmer spoke at length with Glickman, the existence of substantive confidential communications has already been determined as "the law of the case." (Def. Reply at 4)

No evidence as to the contents of the communications between Schwimmer and Glickman was presented at the remand hearing. While I am not persuaded that Schwimmer's position is correct, I shall assume that Schwimmer did convey substantive privileged information to Glickman.

A. Derivative Use of Privileged Information

During Schwimmer's trial, the government did not offer into evidence Glickman's grand jury testimony, Work Papers, or any statements by Glickman. Schwimmer concedes as much, but contends that the government used all this information to develop leads and to prepare for trial. Schwimmer, 892 F.2d at 244-45. Thus, the core issue is whether the government's case against Schwimmer was in any respect derived from information obtained in violation of the attorney-client

privilege and, if so, whether such derivative use of privileged information violated any of Schwimmer's substantial rights. Schwimmer, 892 F.2d at 245.

The problem of "derivative use" typically arises when a defendant invokes the Fifth Amendment privilege against self-incrimination and is subsequently compelled to testify under a grand of immunity. See, e.g., Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653 (1972). Once testimony is compelled, the prosecution may not make any use or derivative use of the compelled testimony. Id. at 453-54, 92 S.Ct. 1661.

If the government chooses to prosecute a person who testified under a grant of immunity, the government bears the "heavy burden of proving that all of the evidence it proposes to use

was derived from legitimate independent sources." Id. at 1665. Schwimmer contends that the government bears the same "heavy burden" of proof in this case because of the government's "intrusion into the sanctuary of the attorney-client privilege." (Def. Mem. at 15)

Because I conclude that the government has satisfied the "heavy burden" described in Kastigar, I may assume, without deciding, that the defendant's contention is correct.

II. GLICKMAN'S COMMUNICATIONS WITH THE PROSECUTION

Prior to seizure of the Work Papers, Glickman spoke with the prosecution on five occasions -- twice before the grand jury in July 1987 and three times in 1988 at the offices of the Organized Crime Strike Force in the Eastern District of New York. I conclude that Schwimmer's attorney-

client privilege was not compromised in any of these five instances.

A. Glickman's Grand Jury Testimony

During his grand jury testimony Mr. Glickman frequently invoked the attorney-client privilege, refusing to disclose any substantive information concerning work he performed in connection with Schwimmer and Renda's joint defense. (Glickman Gr. J. Test. of 7/2/87 at 6, 22, 32, 37, 38) Glickman did testify that he analyzed records for attorney Silverman, prepared work papers and provided figures for certain tax returns. (Glickman Gr. J. Test. of 7/2/87 at 6-7, 9-10, 20-22, 333) He did not, however, provide any substantive insight into the details of these efforts. (See Glickman Gr. J. Test. of 7/2/87 at 32)

Significantly, Mr. Glickman

testified before the grand jury that he had no substantive discussions with Schwimmer or any of Schwimmer's representatives. (Glickman Gr. J. Test. of 7/2/87 at 35-36, 38-40) It is also noteworthy that the post-hearing submissions of Schwimmer's counsel do not now contend that Glickman's grand jury testimony was used, directly or indirectly in violation of Schwimmer's attorney-client privilege.

B. Meetings of April 29, 1988 and May 6, 1988

Subsequent to his grand jury testimony, Glickman met with the prosecution three times. The first two of these meetings were held on April 26, 1988 and May 6, 1988. Schwimmer's counsel now states that these meetings were held "ostensibly for purposes of arriving at a dollar forfeiture appropriate for co-defendant Renda's guilty plea." (Def. Mem. at 5) If

this is meant to imply a more sinister motive on the part of the government, the evidence supports foursquare the conclusion that the purpose of the meetings was to resolve the forfeiture amount to be paid by Renda.

Mr. Glickman attended the meetings at the request of Renda's attorneys, Mr. Fischetti and Mr. Russo. (Tr.134) During the meetings Messrs. Glickman, Fischetti, Russo and Renda attempted to negotiate a reduction in the forfeiture payable by Renda. (Tr.29-30, 34-35, 48-49, 135, 151-157) After the May 6 meeting, Renda agreed to forfeit a sum less than the amount originally demanded by the government. (Tr.150)

At these meetings agent Devine was one of the principal negotiators for the government. (Tr.150-151) He testified that the forfeiture negotiations did not result in

Schwimmer's being charged with any income initially charged to Renda. (Tr.40) Agent Devine believed that there was not even a mention of defendant Schwimmer at the meetings. (Tr.40)

Agent Brozen also participated in the meetings, and his testimony corroborates that of agent Devine. Before the meetings the government learned, through the cooperation of Joseph DeCarlo, that Glickman mistakenly charged Renda with $1 million in wire transfers that should properly have been charged to Schwimmer. (Tr.50-52, 111) Glickman debited the wire transfer to Renda "only because he couldn't disprove the fact that Renda had gotten the money." (Tr.50,52) Agent Brozen testified that discussion of this matter was the only time Schwimmer's name was mentioned.

(Tr.50, 52) Agent Brozen also testified that Glickman never suggested that income charged to Renda should have been charged to Schwimmer. (Tr.52, 111)

Bruce Maffeo attended only parts of the April and May meetings, but he recalled that the substance of the meetings pertained to the forfeiture amount to be paid by Mario Renda. (Tr. 135, 150-153) According to Mr. Maffeo, Glickman's negotiations concerning Renda's forfeiture were "the end of Mr. Glickman at that point" in the case. (Tr.135)

Thus, the only discussion pertaining to Schwimmer at the April and May meetings was the $1 million in wire transfers that Glickman had improperly charged to Renda. This item was discussed because prior to the meetings the government had learned,

through Joseph DeCarlo, that the wire transfers should have been charged to Schwimmer. (Tr.111) No other substantive discussions concerning Schwimmer took place. Accordingly, I find that the government did not obtain privileged information from Glickman in the meetings held in April and May of 1988.

C. The August 18, 1988 Meeting

Glickman's final meeting with the government was held in the Strike Force offices on August 18, 1988. Mr. Maffeo "set the agenda" for this meeting because he wanted to speak with Mr. Glickman. (Tr.147)

At the outset of the meeting Mr. Maffeo cautioned Mr. Glickman that the government "did not want to know any conversations that had occurred between Mr. Glickman and either Mr. Schwimmer or any of the lawyers involved."

(Tr.136) Mr. Glickman told Mr. Maffeo that he had not had any substantive discussions with Schwimmer or attorney Fink. (Tr.137, 147) Further, Mr. Maffeo and Mr. Glickman did not discuss any conversations Glickman might have had with the Russo, Silverman firm. (Tr.137)

Mr. Maffeo testified that the substantive portion of the meeting consisted of his questioning Glickman about the records Glickman used in preparing the Work Papers. (Tr.137, 147) Mr. Maffeo did not inquire into the figures that Glickman ultimately arrived at in the Work Papers, and Mr. Glickman did not volunteer them. (Tr.147-148) According to Mr. Maffeo, he confined his inquiry to the records examined by Glickman without venturing into the substance of Glickman's analysis because the case agents had

already derived their own figures -- figures which Mr. Maffeo had confidence in, provided that they were based on the proper records. (Tr.147-148)

The testimony on remand make clear that Mr. Maffeo did not inquire into any confidential communications Glickman might have had with the Schwimmer defense camp. Accordingly, I conclude that the August 18, 1988 meeting did not result in any violation of Schwimmer's attorney-client privilege.

III. THE WORK PAPERS

After the August 18, 1988 meeting, Mr. Maffeo directed agent Brozen to go to Mr. Glickman's office and examine Mr. Glickman's work papers. (Tr.65, 138) On approximately August 25, 1988 agent Brozen, accompanied by agent Marvin Friedman, went to Mr. Glickman's office and examined the Work Papers.

(Tr.64-66)

While at Glickman's office, agent Brozen asked that some of the Work Papers be copied. (Tr.56) Upon completing his review of the Work Papers, agent Brozen reported to Mr. Maffeo that were was nothing new in the Work Papers to affect the prosecution's case. (Tr.56-57, 138)

Subsequently, the Work Papers were stored in the Strike Force offices. (Tr.21, 56, 153) On November 11, 1989, the Work Papers were sealed. (Tr.20) This weal was not broken until the morning of the remand hearing. (Tr.20)

A. Derivative Use

As previously noted, the major issue on remand is whether the government made any derivative use of information protected by Schwimmer's attorney-client privilege. This brings the Glickman Work Papers into sharp

focus.

The Second Circuit has already said that the "information [Schwimmer] furnished to Glickman . . . was protected by the attorney-client privilege." United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) The Second Circuit did not, however, find that any privileged information was embodied in the Work Papers; I have assumed that it was. I have also assumed that, under Kastigar, the government bears the "very heavy burden" of proving that its case was not in any respect derived from such privileged information.

At the remand hearing, agent Brozen testified that, after reporting that the Work Papers contained no new information, he never again discussed the Work Papers with Mr. Maffeo.. (Tr.57, 110) Agent Brozen also

testified that he never discussed the Work Papers with agent Devine or agent Friedman. (Tr.57, 119) Moreover, agent Brozen testified that he did not in any way use information obtained by examining the Work Papers. (Tr.114)

Agents Devine and Brozen shared primary responsibility for preparing the financial aspects of the case. (Tr.154-155) Agent Devine testified that he never possessed the Work Papers. (Tr.37) Agent Devine also testified that he never discussed the Work Papers with agent Brozen. (Tr.37)

Finally, Mr. Maffeo testified that he never even looked at the Work Papers before the remand hearing (Tr.139), that he never spoke with agent Brozen about them (Tr.138), and that he never discussed their substance with agent Marvin Friedman, agent Devine or Alan Friedman, an Assistant United States

Attorney who assisted with Schwimmer's prosecution. (Tr.139-140) In Mr. Maffeo's view, retrieval of the Work Papers "was a complete non-event" undertaken in an "abundance of over-preparation." (Tr.157)

Despite this compelling testimony, Schwimmer maintains that the government has not adequately established that it did not make impermissible subtle uses of the Work Papers. (Def. Mem. at 41) Specifically, Schwimmer contends that agent Brozen's report to Mr. Maffeo that the Work Papers contained "nothing new" was, in and of itself, an impermissible "use" because it confirmed that the government's case was on solid ground. (Def. Mem. at 42) Schwimmer further contends that the government may have used the Work Papers when preparing cross-examination or when deciding whether to emphasize a

certain piece of evidence. I reject these arguments.

In United States v. McDaniel, 482 F.2d 305 ([8th] Cir. 1973), the [Eighth] Circuit recognized that subtle, indirect uses of immunized testimony "could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." Id. at 311. In United States v. Mariani, 851 F.2d 595 (2d Cir. 1988), the Court of Appeals declined to follow McDaniel to the extent that it "can be read to foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought process in . . . preparing for trial .

. ." Id. at 600.

In Mariani, the District Court had found that immunized testimony was improperly used by the prosecution (i) in deciding whether to prepare cross-examination of the defendant, (ii) to corroborate testimony of government witnesses, and (iii) to confirm information possessed by the prosecution. Id. at 599. The Second Circuit reversed, stating that such uses "were wholly conjectural and insubstantial." Id. at 601.

As in Mariani, the uses alleged by Schwimmer are "wholly conjectural and insubstantial." The testimony indicates that the government, through Mr. Maffeo, answered "ready for trial" in March 1988, well before the Work Papers were recovered. (Tr.156) The government's readiness was based solely on the investigative work of the agents

involved. (Tr.17-18, 86-87, 102, 105-106, 110-111, 147-148, 156-157) At most, the subsequent recovery of the Work Papers confirmed information already held, in substance, by the prosecution.[2] Mere confirmatory "use" is precisely the type of use dismissed by the Second Circuit as "wholly conjectural and insubstantial." Mariani, 851 F.2d at 601.

Schwimmer also contends that the Work Papers could have been used to prepare cross-examination or in deciding whether to emphasize or de-emphasize certain evidence. The simple answer to these contentions is that no such use of the Work Papers was made.

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[2] As discussed below, the figures in the Glickman Work Papers were not always identical to those in the agents' spreadsheets. It was, however, agent Brozen's view that the Work Papers contained "nothing new," and that it is all he reported to Mr. Maffeo. (Tr.107, 138)

(Tr.21-11,114, 157) The only witness cross-examined by the government was cross-examined by Assistant United States Attorney Alan Friedman. Mr. Friedman neither saw the Work Papers nor discussed them with Mr. Maffeo or agent Brozen. (Tr.57-139) Additionally, even if the Work Papers corroborated government evidence, the record indicates that the government did not choose to emphasize such evidence. (Tr.156-157) The mere corroboration of government evidence, without more, is another "use" the Second Circuit has found to be "conjectural and insubstantial." Mariani, 851 F.2d at 600-601.

Based on the overwhelming evidence presented at the remand hearing, and the Second Circuit's guidance in Mariani, I conclude that the Work Papers were not directly or indirectly

used by the government in contravention of any of Schwimmer's rights.

B. Legitimate Independent Sources of Proof

Schwimmer correctly states that, under Kastigar, the government does not satisfy its burden merely by demonstrating non-use of tainted evidence. (Def. Mem. at 39-40) Assuming Kastigar applies, the government must also prove that its evidence was obtained from legitimate independent sources. United States v. Bianco, 534 F.2d 501, 509 (2d Cir.), cert. denied, 429 U.S. 822, 97 S.Ct. 73 (1976); see United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977).

The testimony on remand demonstrates that, the government's case was principally derived from the field investigations of agents Brozen and Devine. The foundation for these investigations was the documentary

evidence recovered from First United's offices.

Included among the documentary evidence were several canceled checks drawn on the off book accounts. Agents Brozen and Devine analyzed the checks to determine who got the money. In some instances the agents were able to make this determination by merely inspecting the checks. (Tr.11,45) Inspection of certain checks, however, did not reveal where the funds they represented came to rest.

In these instances, agents Brozen and Devine attempted to allocate the checks' proceeds between Schwimmer and Renda by examining the "back end" of each transaction. (Tr.11, 45-46) First, the agents examined the checks to determine where they were negotiated. Next, agents Brozen and Devine interviewed the principal of the

business which cashed the check to determine who received the check's proceeds. The principal of Nu-Service, All-County Tobacco and Crown Confection was Bill Brooks. (Tr.14-15, 46-47) Allen Gouz was the principal of various entities operating under the Gouz name. (Tr.12-14)

Thus, the record indicates that the case against Schwimmer was derived from evidence uncovered by agents Brozen and Devine. (Tr.147-148, 156-157) All this evidence was obtained before the government acquired the Work Papers; and it was this evidence alone that led Mr. Maffeo to answer "ready for trial" in March 1988. (Tr.156-157) Accordingly, I conclude that the government has provided more than ample proof that its evidence against Schwimmer was secured from legitimate independent sources.

C. Absence of Testimony from Agent Marvin Friedman

When agent Brozen retrieved the Work Papers from Mr. Glickman's office he was accompanied by agent Marvin Friedman. Agent Friedman did not testify at the remand hearing. Schwimmer contends that the absence of testimony from agent Friedman "precludes an affirmative finding that the government met its heavy burden of proof." (Def. Mem. at 40) This contention proves too much.

To satisfy its burden of proof under Kastigar, the government need not provide testimony from every person in any way associated with the Schwimmer investigation. United States v. Romano, 583 F.2d 1, 8 (1st Cir. 1978); see Bianco, 534 F.2d at 509-10. On the other hand, the government may not rely on mere conclusory denials. See United States v. Nemes, 555 F.2d 51, 54-55 (2d

Cir. 1977).

In this regard, I am persuaded by the reasoning of the First Circuit in United States v. Romano:

> [m]uch obviously depends on all the facts and circumstances of a particular case. Here we think it was not necessary, nor would it have been particularly meaningful to require that every individual in any manner affiliate with the investigation provide an affidavit denying contact with the testimony. Affidavits from principal investigators were provided and there was much additional evidence -- and nothing to the contrary -- establishing lack of taint. 583 F.2d at 8.

As in Romano, I conclude that it was not necessary for the government to provide testimony from agent Friedman to establish non-use of the Work Papers.

The principal agents involved in the financial investigation, agents Brozen and Devine, testimony that they

did not use the Work Papers in any way. Mr. Maffeo testified that he did not use the Work Papers or recall any discussion of the Work Papers with agent Friedman. (Tr.139, 157) My conclusion that the government's case was derived from legitimate independent sources of proof is not affected by gossamer speculation concerning possible use of the Work Papers by agent Marvin Friedman.

D. New Information Contained in the Glickman Work Papers

Finally, Schwimmer makes much of the fact that the Work Papers contained some figures different from those contained in the government's spreadsheets. (Def. Mem. at 23-38)[3]

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[3]Schwimmer maintains that the different figures in the Work Papers were "new information." (Def. Mem. at 14-15) According to Schwimmer, the mere fact that the Government obtained such information "is dispositive on this hearing since the prosecutor failed to establish procedures (i.e.,

Schwimmer also contends that alterations appearing in the government spreadsheets establish that the government "used" the Work Papers (Id.).

I have laboriously scrutinized the government spreadsheets, the Work Papers and the items discussed in Schwimmer's post-hearing submissions.

"Chinese Walls") to prevent use of this information . . ." (Def. Mem. at 14-15) This argument overstates the law in this Circuit and is without merit. The case cited by defendant, United States v. Schwimmer, 882 F.2d 22, 26 (2d Cir. 1989), is an earlier proceeding in this very case. In Schwimmer, the Second Circuit stated that, if there is a retrial, "without deciding the issue, it would appear prudent for the government to establish a so-called "Chinese Wall" . . ." Id. Because there has been no retrial, Schwimmer obviously does not yet require erection of Chinese Walls in this case. It is also noteworthy that even in the event of a retrial, the Second Circuit recommended, rather than required, that the prosecution take steps to separate its prosecutor from persons exposed to tainted evidence. Id. For the above reasons, I reject Schwimmer's "Chinese Wall" argument.

Schwimmer's contention that the Work Papers contain figures different from those in the government spreadsheets is correct. The government does not, however, claim that all the figures are identical.[4] (Tr.90)

Of the hundreds of entries in the government spreadsheets, Schwimmer focuses on a relatively few figures that differ from figures in the Work Papers. According to Schwimmer, these differences establish that the government obtained "additional information" from the Work Papers. (Def. Mem. at 24) I disagree.

After examining the Work Papers, agent Brozen concluded that they

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[4] Apparently, before the Second Circuit the government claimed that it possessed "everything" that was in the Work Papers. (Tr.95-97) The government abandoned this claim at the remand hearing by admitting that the Work Papers contained some figures different from the government spreadsheets.

contained "nothing we didn't know already . . ." Despite the difference of some figures, agent Brozen obviously concluded that the substance of the Work Papers was the same as the information reflected in the government spreadsheets. Agent Brozen did not report to Mr. Maffeo that the Work Papers contained information he "hadn't seen in precisely that form . . ." (Tr.114) Because Mr. Maffeo believed that the Work Papers contained no new information, he did not adjust preparation of Schwimmer's prosecution after the Work Papers were obtained. (Tr.157) Therefore, I am satisfied that the Work Papers did not provide new substantive information that was used by the government.

I have also examined the alterations of the government spreadsheets referred to by Schwimmer.

Most of these alterations serve only to reduce income allocated to Renda. It is not surprising that Renda's allocations are reduced, as agents Brozen and Devine testified that Glickman negotiated for such reductions. Reductions in the income allocated to Mr. Renda do not, however, indicate that the government "used" the Work Papers.

Two $500,000 transactions conducted with the Republic National Bank were initially charged to Renda and subsequently allocated to Schwimmer. (Tr.88) This re-allocation was made as a result of Joseph DeCarlo's cooperation. (Tr.50, 51, 111)

Of the hundreds of items allocated to Schwimmer in the government spreadsheets, only one other item was ever charged to Mario Renda. (Gov. Exh. F4-B,check No. 522) It is beyond

question that Schwimmer's fate was sealed whether or not this single item was charged to Schwimmer. Moreover, as discussed above, the testimony indicates that not even this item was charged to Schwimmer through use of the Work Papers.

Thus, a thorough review of the government spreadsheets, the Work Papers and the arguments of Schwimmer's counsel does not affect my conclusion that the government did not use the Work Papers.

IV. TESTIMONY OF MR. MAFFEO

Lastly, Schwimmer contends that this Court improperly called Mr. Maffeo as a witness after the parties rested. (Tr.19) This is an untimely, last-ditch technical argument that smells of the lamp.

First of all, Schwimmer's contention that the parties rested

before Mr. Maffeo was called is not supported by the record. Throughout the remand hearing Schwimmer's own counsel suggested that he might call Mr. Maffeo as a witness. (Tr.75, 81) After Assistant United States Attorney Alan Friedman indicated that he would not call Mr. Maffeo as a witness, he rested. (Tr.118-123) At this juncture, the Court indicated that it might find testimony from Mr. Maffeo helpful. (Tr.125) With unseemly haste, counsel for Schwimmer then rested immediately. (Tr.126)

Clearly, this Court has the authority to call witnesses to supplement the record. Fed. R. Evid. 614. That a trial court lacks this power "never will be conceded so long as the bench retains a true conception of its constitutional function and a due sense of self-respect." 9 Wigmore,

Evidence §2484 at 282. (Chadbourn rev. 1981). I reject the notion that counsel can enervate this Court's ancient power to call a witness by interjecting his intention to rest after the Court has expressed its interest in a witnesses' testimony. The argument, though perhaps ingenious, is not ingenuous.

Further, Schwimmer's objection, if that is what it was, was certainly not calculated to apprise the Court of his concern. After Mr. Maffeo took the stand, Schwimmer's counsel stated that:

> I thought your Honor was calling [Mr. Maffeo] as your witness, as opposed to Mr. Friedman calling him. If your Honor prefers it that way, that's okay. I want to put on the record I'm confused as to how this is proceeding. (Tr. 131) (emphasis added).

Schwimmer's counsel did not object to Mr. Maffeo's testimony at any point during the hearing.

Fed. R. Evid. 614(c) provides that "[o]bjections to the calling of witnesses by the court . . . may be made at the time . . ." This rule is intended to ensure that objections are timely made, thereby enabling the Court to taken any necessary corrective measures. 3 Weinstein's Evidence, ¶614[04]; see Fed. R. Evid. 614 advisory committee's note. Clearly, counsel cannot remain silent during a hearing, effectively waiting in ambush, and only afterwards spring its objections on this Court. Because Schwimmer did not object to Mr. Maffeo's testimony during the remand hearing, I reject Schwimmer's belated objections as untimely.

CONCLUSION

For the reasons discussed above, I conclude that the government has met its burden of proving that its case was

derived from legitimate independent sources of proof rather than from the direct of indirect use of privileged information. I also conclude that Mr. Maffeo properly testified at the remand hearing.

SO ORDERED.

Dated: Brooklyn, New York
May 31, 1990

JOSEPH M. McLAUGHLIN,
U.S.D.J.

The Clerk shall make copies of this Order and shall serve them upon the parties.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of January, one thousand nine hundred and ninety-one.

Present: HON. ROGER J. MINER
HON. FRANK X. ALTIMARI
Circuit Judges,
HON. WILLIAM P. GRAY,
District Judge,

UNITED STATES OF AMERICA

Appellee,

Docket No.
89-1106

-against-

MARTIN SCHWIMMER,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be considered on the transcript of record from the United States District Court for the Eastern District of New York without oral argument.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

Elaine B. Goldsmith, Clerk
By:

Edward J. Guardaro,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED STATES COURT
OF APPEALS
FILED
MAR 19 1991
ELAINE B.
GOLDSMITH, CLERK
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of MARCH, one thousand nine hundred and NINETY-ONE

UNITED STATES OF AMERICA,
APPELLEE,

V.

DOCKET NUMBER
89-1106

MARTIN SCHWIMMER,
DEFENDANT-
APPELLANT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant SCHWIMMER

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has

been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk